

16A Am. Jur. 2d Constitutional Law VIII A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [States](#)  4.4(2), 21(2)

A.L.R. Library

A.L.R. Index, Counties

A.L.R. Index, Due Process

A.L.R. Index, Municipal Corporations

A.L.R. Index, Police Power

A.L.R. Index, States

West's A.L.R. Digest, [States](#)  4.4(2), 21(2)

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16A Am. Jur. 2d Constitutional Law § 333

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

1. Overview

§ 333. Police power, generally; definition; source of power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

"Police power" is a general term used to express the particular authority of a government to act, which belongs to every sovereign government.¹ It is an inherent attribute of the states.² Thus, the police power is now more commonly termed the state's regulatory authority,³ and is essentially the power to govern.⁴ The "police power" of the state is best defined on a case-by-case basis.⁵

Observation:

A definition of "police power" is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.⁶ According to some authority, since the police power simply refers to governmental action not precluded by any specific provision in the Federal or State Constitution, it has little or no useful meaning.⁷

The police power cannot be circumscribed within narrow limits or confined to precedents resting alone on conditions of the past.⁸ The term "police power" is difficult to define precisely because it is extensive, elastic, and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare.⁹

A state's police power has been described as the power of the legislature to make such regulations relating to personal and property rights as appertain to the public health, the public safety, and the public morals,¹⁰ as the legislature's broad, inherent power to pass laws that promote the public health, safety, and welfare,¹¹ as the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they judge to be for the good and welfare of the state and of the subjects of the same,¹² as a state's inherent power, as a sovereign, to enact laws to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.¹³ and as the ability of the state to impose restraints on private rights that are necessary to the general welfare.¹⁴ The police power is not a grant derived from or under any written constitution.¹⁵ It is an essential element of the social compact.¹⁶ Thus, the states, vested as they are with the general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power.¹⁷ The term "police power" is not found in the Declaration of Independence, the Federal Constitution, or even in most state constitutions.¹⁸

The police power is as old as the civilized governments that exercise it. The states existed before the Constitution of the United States, and they possessed the police power before the adoption of that organic document.¹⁹ The states require no specific grant of authority in the Federal Constitution to legislate on matters that are traditionally within the scope of the police power.²⁰ Moreover, the Constitution supposes the preexistence of the police power and must be construed in that light.²¹

The police power is a grant from the people to their governmental agents²² and is the practical manifestation of each individual's agreement, as part of the social compact, to subject that individual's rights to the common good in cases of conflict.²³ The right of the legislature to exercise the police power is not only not referable to any single provision of the Constitution but also inheres in and springs from the nature of our institutions.²⁴ The constitutional notion of the "police power" does not refer to an independent source of legislative power itself but merely represents the legislature's general plenary power to legislate.²⁵

The power of the states to enact and enforce criminal laws is constitutional in nature.²⁶ States possess primary authority for defining and enforcing the criminal law, and the administration of criminal justice resides with the states except as Congress has created offenses against the United States.²⁷ The authority to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the states.²⁸ Thus, each state's power to prosecute is derived from its inherent sovereignty, not from the Federal Government.²⁹

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Footnotes

1 [Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); [Massingill v. Department of Food & Agriculture](#), 102 Cal. App. 4th 498, 125 Cal. Rptr. 2d 561 (4th Dist. 2002); [Eggleston v. Pierce County](#), 148 Wash. 2d 760, 64 P.3d 618 (2003); [Hartley Hill Hunt Club v. County Com'n of Ritchie County](#), 220 W. Va. 382, 647 S.E.2d 818 (2007); [Rusk v. City of Milwaukee](#), 2007 WI App 7, 298 Wis. 2d 407, 727 N.W.2d 358 (Ct. App. 2006).

2 § 334.

As to the exercise of the police power by the states, see §§ 339 to 342.

- 3 Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).
- 4 VNA Hospice of Maryland v. Department of Health and Mental Hygiene, 406 Md. 584, 961 A.2d 557 (2008).
- 5 Morial v. Smith & Wesson Corp., 785 So. 2d 1 (La. 2001).
- 6 Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
- 7 VNA Hospice of Maryland v. Department of Health and Mental Hygiene, 406 Md. 584, 961 A.2d 557 (2008).
- 8 State v. Ivey, 196 W. Va. 571, 474 S.E.2d 501 (1996).
- 9 State v. Ivey, 196 W. Va. 571, 474 S.E.2d 501 (1996).
- 10 State v. White, 556 S.W.3d 110 (Mo. Ct. App. W.D. 2018).
- 11 Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223 (Iowa 2018); Ristvey v. Com., Dept. of Transp., 52 A.3d 425 (Pa. Commw. Ct. 2012).
- 12 Nies v. Town of Emerald Isle, 244 N.C. App. 81, 780 S.E.2d 187 (2015).
- 13 Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 749 S.E.2d 176 (2013).
- 14 State ex rel. Com'r of Human Services v. Buchmann, 830 N.W.2d 895 (Minn. Ct. App. 2013).
- 15 Geurin v. City of Little Rock, 203 Ark. 103, 155 S.W.2d 719 (1941); McInerney v. Ervin, 46 So. 2d 458 (Fla. 1950); New Jersey Shore Builders Ass'n v. Township of Jackson, 199 N.J. 38, 970 A.2d 992 (2009).
- 16 New Jersey Shore Builders Ass'n v. Township of Jackson, 199 N.J. 38, 970 A.2d 992 (2009).
- 17 City of Newport, Ky. v. Iacobucci, 479 U.S. 92, 107 S. Ct. 383, 93 L. Ed. 2d 334 (1986) (abrogated on other grounds by, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996)).
- 18 Myers v. City of Defiance, 67 Ohio App. 159, 21 Ohio Op. 165, 31 Ohio L. Abs. 636, 36 N.E.2d 162 (3d Dist. Defiance County 1940).
- 19 Geurin v. City of Little Rock, 203 Ark. 103, 155 S.W.2d 719 (1941); McInerney v. Ervin, 46 So. 2d 458 (Fla. 1950); Quesenberry v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956).
- 20 Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Com'rs, 32 F.3d 1436 (10th Cir. 1994).
- 21 Geurin v. City of Little Rock, 203 Ark. 103, 155 S.W.2d 719 (1941); State ex rel. City of Minot v. Gronna, 79 N.D. 673, 59 N.W.2d 514 (1953); Quesenberry v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956).
- 22 Geurin v. City of Little Rock, 203 Ark. 103, 155 S.W.2d 719 (1941); Cavalier Vending Corp. v. State Bd. of Pharmacy, 195 Va. 626, 79 S.E.2d 636 (1954); Quesenberry v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956).
- 23 State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).
- 24 Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (1935).
- 25 State v. Hirsch, 338 Or. 622, 114 P.3d 1104 (2005) (overruled on other grounds by, State v. Christian, 354 Or. 22, 307 P.3d 429 (2013)).
- 26 Commonwealth of Puerto Rico v. U.S., 490 F.3d 50 (1st Cir. 2007).
Sovereign states have strong interests in formulating and enforcing their own criminal justice systems. In re: Smith, 547 B.R. 774 (E.D. Mich. 2016).
- 27 Torres v. Lynch, 136 S. Ct. 1619, 194 L. Ed. 2d 737 (2016); Breazeale v. Victim Services, Inc., 878 F.3d 759 (9th Cir. 2017).
- 28 In re Pogue, 357 B.R. 756 (Bankr. W.D. Ky. 2006).
- 29 State v. Proell, 2007 ND 17, 726 N.W.2d 591 (N.D. 2007).

End of Document

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16A Am. Jur. 2d Constitutional Law § 334

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

1. Overview

§ 334. Nature of police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power is an indispensable and essential¹ attribute of sovereignty,² and has been said to be an inherent attribute of the states.³

The police power is plenary in scope⁴ and is a necessary feature of every civilized government.⁵ It is one of the most essential and least limitable powers of the states.⁶ An act is within the state's police power if it is reasonably related to a legitimate governmental interest,⁷ even if authorities have treated such conduct as grand old traditions and turned a blind eye in the past.⁸

Practice Tip:

Because a law adopted in the exercise of the police power is presumed constitutional, its challenger bears the burden of affirmatively and clearly establishing its invalidity.⁹

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Footnotes

- 1 [McInerney v. Ervin](#), 46 So. 2d 458 (Fla. 1950); [State ex rel. Zugravu v. O'Brien](#), 130 Ohio St. 23, 3 Ohio Op. 74, 196 N.E. 664 (1935); [State v. Langley](#), 53 Wyo. 332, 84 P.2d 767 (1938).
- 2 [Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.](#), 91 Cal. App. 4th 678, 110 Cal. Rptr. 2d 708 (1st Dist. 2001), as modified on denial of reh'g, (Sept. 13, 2001); [Hudson v. City of Shawnee](#), 246 Kan. 395, 790 P.2d 933 (1990); [Sowma v. Parker](#), 112 Vt. 241, 22 A.2d 513 (1941); [State v. Ivey](#), 196 W. Va. 571, 474 S.E.2d 501 (1996).
- 3 [Town of Dillon v. Yacht Club Condominiums Home Owners Association](#), 2014 CO 37, 325 P.3d 1032 (Colo. 2014); [Gacke v. Pork Xtra, L.L.C.](#), 684 N.W.2d 168 (Iowa 2004); [State v. Edwards](#), 787 So. 2d 981 (La. 2001); [Belle Isle Grill Corp. v. City of Detroit](#), 256 Mich. App. 463, 666 N.W.2d 271 (2003); [New Jersey Shore Builders Ass'n v. Township of Jackson](#), 199 N.J. 38, 970 A.2d 992 (2009); [Fine Airport Parking, Inc. v. City of Tulsa](#), 2003 OK 27, 71 P.3d 5 (Okla. 2003); [Eggleston v. Pierce County](#), 148 Wash. 2d 760, 64 P.3d 618 (2003); [Hartley Hill Hunt Club v. County Com'n of Ritchie County](#), 220 W. Va. 382, 647 S.E.2d 818 (2007); [State v. Smet](#), 2005 WI App 263, 288 Wis. 2d 525, 709 N.W.2d 474 (Ct. App. 2005).
As to the exercise of the police power by the states, see §§ 339 to 342.
- 4 [Carbo v. City of Slidell](#), 844 So. 2d 1 (La. Ct. App. 1st Cir. 2003), writ denied, 842 So. 2d 400 (La. 2003).
- 5 [CF & I Steel, L.P. v. United Steel Workers of America \(USWA\)](#), 74 P.3d 513 (Colo. App. 2003); [Posey v. Com.](#), 185 S.W.3d 170 (Ky. 2006); [Jacobs Ranch, L.L.C. v. Smith](#), 2006 OK 34, 148 P.3d 842 (Okla. 2006), as corrected, (Nov. 6, 2006).
- 6 [Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection](#), 584 Pa. 494, 884 A.2d 867 (2005).
- 7 [People v. Gross](#), 830 P.2d 933 (Colo. 1992).
- 8 [McKenzie v. State](#), 131 Md. App. 124, 748 A.2d 67, 143 Ed. Law Rep. 273 (2000).
- 9 [Dawson v. State](#), 329 Md. 275, 619 A.2d 111 (1993); [Town of Hilton Head Island v. Fine Liquors, Ltd.](#), 302 S.C. 550, 397 S.E.2d 662 (1990); [Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County](#), 248 Va. 488, 449 S.E.2d 787 (1994).

End of Document

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16A Am. Jur. 2d Constitutional Law § 335

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

1. Overview

§ 335. Distinctions between police and other governmental powers

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect, 23 A.L.R.5th 834](#)

[Local use zoning of wetlands or flood plain as taking without compensation, 19 A.L.R.4th 756](#)

[Construction and Application of "Public Use" Restriction in Fifth Amendment's Takings Clause—United States Supreme Court Cases, 10 A.L.R. Fed. 2d 407](#)

[What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases, 10 A.L.R. Fed. 2d 231](#)

The boundary line dividing the police power of the state from the other functions of government is often difficult to discern.¹ For example, although its exercise and the exercise of the power of eminent domain have much in common,² the police and eminent domain powers are also essentially distinct.³ Thus, under the police power, many kinds of restrictions may be imposed without compensation being given, whereas under the power of eminent domain compensation is required.⁴ Private property is taken by eminent domain for a public use, while the police power regulates the use and enjoyment of property.⁵ The mere

assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory "taking" of property for eminent domain purposes,⁶ as all property is held subject to the valid exercise of the police power.⁷

As to the power to tax, there is a genuine distinction between the police power and the state's distinct, coexistent⁸ authority to levy taxes.⁹ The basic difference is that the taxing power is exercised to raise revenue and is subject to certain designated constitutional limitations, while the police power is exercised to promote the public welfare and is not subject to the constitutional restrictions that apply to the taxing power.¹⁰ If the primary purpose of a statute or ordinance is to raise revenue, it represents an exercise of the taxing power,¹¹ while if the primary purpose is to regulate some particular occupation, calling, or activity, it is an exercise of the police power even if incidentally producing revenue.¹²

The war power of Congress is not unlike what in the states is called the police power, but it is the police power raised to the highest degree.¹³ The war power preserves sovereignty, while the police power preserves the health and morals of the community.¹⁴ The state's power to effect extraordinary regulations in emergencies is less extensive than the war power of the Federal Government as the regulatory authority is confined to the scope of the police power itself.¹⁵

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Footnotes

- 1 Smiley v. MacDonald, 42 Neb. 5, 60 N.W. 355 (1894); Colletti v. State, 12 Ohio App. 104, 1919 WL 915 (8th Dist. Summit County 1919).
- 2 New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153, 105 A.L.R. 905 (1936).
- 3 Adams v. Housing Authority of City of Daytona Beach, 60 So. 2d 663 (Fla. 1952) (overruled in part on other grounds by, Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale, 315 So. 2d 451 (Fla. 1975)).
- 4 As to the power of eminent domain, generally, see Am. Jur. 2d, Eminent Domain §§ 1 et seq.
State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Rothwell v. Linzell, 163 Ohio St. 517, 56 Ohio Op. 431, 127 N.E.2d 524 (1955).
- 5 State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Appeal of White, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215 (1926); Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393 (1921).
- 6 U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985).
- 7 Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004).
- 8 Iowa Motor Vehicle Ass'n v. Board of R.R. Com'rs, 207 Iowa 461, 221 N.W. 364, 75 A.L.R. 1 (1928), aff'd, 280 U.S. 529, 50 S. Ct. 151, 74 L. Ed. 595 (1930).
- 9 State v. Anderson, 144 Tenn. 564, 234 S.W. 768, 19 A.L.R. 180 (1920).
- 10 State v. Gowdy, 62 Mont. 119, 203 P. 1115 (1922); State v. Anderson, 144 Tenn. 564, 234 S.W. 768, 19 A.L.R. 180 (1920); Robinson v. City of Norfolk, 108 Va. 14, 60 S.E. 762 (1908).
- 11 Village of Lemont v. Jenks, 197 Ill. 363, 64 N.E. 362 (1902); State v. McFall, 112 Or. 183, 229 P. 79 (1924); State v. Anderson, 144 Tenn. 564, 234 S.W. 768, 19 A.L.R. 180 (1920).
- 12 State v. McFall, 112 Or. 183, 229 P. 79 (1924); State v. Packer Corporation, 77 Utah 500, 297 P. 1013 (1931); Unemployment Compensation Commission v. Renner, 59 Wyo. 437, 143 P.2d 181 (1943).
- 13 Public Service Commission, Second Dist. v. New York Cent. R. Co., 230 N.Y. 149, 129 N.E. 455, 14 A.L.R. 449 (1920).
- 14 Gutttag v. Shatzkin, 230 N.Y. 647, 130 N.E. 929 (1921).
- 15 Ex parte Blaney, 30 Cal. 2d 643, 184 P.2d 892 (1947).

16A Am. Jur. 2d Constitutional Law § 336

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

1. Overview

§ 336. Flexibility of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power is a continuing authority¹ that is quite broad and comprehensive,² which is to be liberally construed and applied.³

The police power of the state is capable of development and modification within constitutional limits, to allow the powers of governmental control to meet changing social, economic, and political conditions.⁴ Thus, the police power is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public.⁵ As a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions.⁶

A legislature need not deal with every problem at once⁷ and must be afforded a degree of leeway in tailoring the means to the ends.⁸ Thus, in exercising the police power, the legislature may proceed step by step, condemning that which it deems to be the greatest menace to the health and welfare of the people and leaving further regulation and prohibition for future consideration.⁹

Similarly, on the local level, the Federal Constitution does not require a city council, for example, to enact a perfect law.¹⁰ The council may proceed step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.¹¹ Without the presence of some circumstances to induce heightened judicial scrutiny,

a court is entitled to presume that a municipal ordinance is valid and is not required to delve into the motivations of board members who proposed and drafted the ordinance.¹²

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Footnotes

- 1 City of Plantation v. Utilities Operating Co., 156 So. 2d 842 (Fla. 1963); Application of Minneapolis Street Ry. Co., 228 Minn. 435, 37 N.W.2d 533 (1949); Kalbfell v. City of St. Louis, 357 Mo. 986, 211 S.W.2d 911 (1948).
- 2 Hyde v. Albert E. Peirce & Co., 147 Or. 5, 31 P.2d 755 (1934).
A state's police power is truly a thing of vitality and reality and it is a power that is both broad and useful. Illinois Cent. R. Co. v. Com., 305 Ky. 632, 204 S.W.2d 973 (1947).
The police power of a state is comprehensive and reaches nearly every aspect of civil society. National City Bank of New York v. Del Sordo, 16 N.J. 530, 109 A.2d 631 (1954).
- 3 Mendiola v. Graham, 139 Or. 592, 10 P.2d 911 (1932).
- 4 Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177, 156 A.L.R. 568 (1944); Hoff v. State, 39 Del. 134, 197 A. 75 (Super. Ct. 1938); Herrin v. Arnold, 1938 OK 440, 183 Okla. 392, 82 P.2d 977, 119 A.L.R. 1471 (1938); Hyde v. Albert E. Peirce & Co., 147 Or. 5, 31 P.2d 755 (1934); Mumpower v. Housing Authority of City of Bristol, 176 Va. 426, 11 S.E.2d 732 (1940).
- 5 Santa Margarita Area Residents Together v. San Luis Obispo County, 84 Cal. App. 4th 221, 100 Cal. Rptr. 2d 740 (2d Dist. 2000).
- 6 Santa Margarita Area Residents Together v. San Luis Obispo County, 84 Cal. App. 4th 221, 100 Cal. Rptr. 2d 740 (2d Dist. 2000).
- 7 Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (Congress); State v. Evenson, 201 Ariz. 209, 33 P.3d 780 (Ct. App. Div. 1 2001) (state legislature).
- 8 Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996); LensCrafters, Inc. v. Sundquist, 33 S.W.3d 772 (Tenn. 2000).
- 9 Porter v. City of Oberlin, 1 Ohio St. 2d 143, 30 Ohio Op. 2d 491, 205 N.E.2d 363 (1965).
- 10 Sklar v. Byrne, 727 F.2d 633 (7th Cir. 1984).
- 11 Sklar v. Byrne, 727 F.2d 633 (7th Cir. 1984).
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End of Document

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16A Am. Jur. 2d Constitutional Law § 337

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

1. Overview

§ 337. Inalienability of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The state may not surrender, abdicate, or abridge its police power.¹ Any attempt to do so is simply unenforceable.² It is a fundamental principle of constitutional law that in matters relating to the police power, each successive legislature is of equal authority.³ Thus, a legislative body cannot part with its right to exercise that power, since it inherently has authority to use the power again and again as often as the public interest may require.⁴

The state cannot barter or bargain away the right to use the police power,⁵ either through contract⁶ or by enacting a law that cannot be repealed.⁷ Thus, an entity whose rights are subject to state restriction cannot remove those rights from the power of the state by making a contract about them.⁸ The discretion of the legislature with respect to exercise of the police power cannot be parted with any more than the power itself.⁹ A municipality cannot, by contract, foreclose the exercise of the police power¹⁰ unless clearly authorized to do so by the supreme legislative power.¹¹

A statute that embodies a legislative attempt to surrender or limit the state's police powers is unconstitutional and void.¹² However, the inalienability of the police power does not preclude its delegation to municipalities and other governmental subdivisions as those entities are part of the total government of the state.¹³

Observation:

When a legislative body retains the police power, articulated standards and guidelines to limit the exercise of that power are unnecessary. However, police powers that are delegated must include minimum standards and guidelines for their application.¹⁴

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Footnotes

- 1 [Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.](#), 176 P.3d 737 (Colo. 2007); [Claddie Savage v. Prator](#), 886 So. 2d 523 (La. Ct. App. 2d Cir. 2004), writ granted, 896 So. 2d 13 (La. 2005) and rev'd on other grounds, 921 So. 2d 51 (La. 2006).
- 2 [Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.](#), 176 P.3d 737 (Colo. 2007).
- 3 [State ex rel. City of Minot v. Gronna](#), 79 N.D. 673, 59 N.W.2d 514 (1953); [Shealy v. Southern Ry. Co.](#), 127 S.C. 15, 120 S.E. 561 (1924).
- 4 [Application of Minneapolis Street Ry. Co.](#), 228 Minn. 435, 37 N.W.2d 533 (1949); [State ex rel. City of Minot v. Gronna](#), 79 N.D. 673, 59 N.W.2d 514 (1953).
- 5 [Home Bldg. & Loan Ass'n v. Blaisdell](#), 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934); [Lipscomb v. Columbus Mun. Separate School Dist.](#), 269 F.3d 494, 158 Ed. Law Rep. 200 (5th Cir. 2001); [Richeson v. Helal](#), 158 Cal. App. 4th 268, 70 Cal. Rptr. 3d 18 (2d Dist. 2007), as modified, (Dec. 21, 2007); [Shealy v. Southern Ry. Co.](#), 127 S.C. 15, 120 S.E. 561 (1924); [McKenna v. State Highway Commission](#), 28 Wis. 2d 179, 135 N.W.2d 827 (1965).
- 6 [Phillips Petroleum Co. v. Jenkins](#), 297 U.S. 629, 56 S. Ct. 611, 80 L. Ed. 943 (1936); [State v. Lookabill](#), 176 Neb. 254, 125 N.W.2d 695 (1964), order modified, 176 Neb. 415, 126 N.W.2d 403 (1964).
- 7 [Richeson v. Helal](#), 158 Cal. App. 4th 268, 70 Cal. Rptr. 3d 18 (2d Dist. 2007), as modified, (Dec. 21, 2007).
- 8 [SEMO, Inc. v. Board of Com'rs for Atchafalaya Basin Levee Dist.](#), 993 So. 2d 222 (La. Ct. App. 1st Cir. 2008).
- 9 [Oklahoma Alcoholic Beverage Control Bd. v. Milam](#), 1964 OK 54, 393 P.2d 823 (Okla. 1964).
- 10 [Lingo Lumber Co. v. Hayes](#), 64 S.W.2d 835 (Tex. Civ. App. Dallas 1933).
- 11 [Home Tel. & Tel. Co. v. City of Los Angeles](#), 211 U.S. 265, 29 S. Ct. 50, 53 L. Ed. 176 (1908); [Sumter Gas & Power Co. v. City of Sumter](#), 283 F. 931 (C.C.A. 4th Cir. 1922).
- 12 [State v. Sensenbrenner](#), 262 Wis. 118, 53 N.W.2d 773 (1952).
- 13 [City of New Orleans v. Board of Com'rs of Orleans Levee Dist.](#), 640 So. 2d 237 (La. 1994); [People v. Weinberg](#), 142 Misc. 2d 608, 537 N.Y.S.2d 1003 (J. Ct. 1988).
- 14 [Cary v. City of Rapid City](#), 1997 SD 18, 559 N.W.2d 891 (S.D. 1997).

End of Document

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16A Am. Jur. 2d Constitutional Law § 338

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

1. Overview

§ 338. Police power as law of necessity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power has been described as being coextensive with the necessities of the case and the safeguards of public interest.¹ In a general way, the police power extends to all the great public needs.² Thus, governments may undertake to do more than the Constitution requires.³ For example, a law requiring all automobile drivers to have mandatory insurance coverage is within the state's police power.⁴ It is not essential that a present necessity exist before the legislature exercises its police power, as it may act to prevent apprehended dangers as well as to control those that already exist.⁵

Although an emergency does not create power, increase a granted power, or remove or diminish the restrictions imposed upon a power granted or reserved, an emergency may furnish the occasion for the exercise of police measures.⁶ It must be borne in mind, however, that an emergency does not automatically remove all constitutional restraints.⁷ Accordingly, a law that depends upon the existence of an emergency to uphold it may cease to operate if the emergency ceases, even though it was valid when passed.⁸

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Footnotes

¹ [State v. Kartus](#), 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336 (1935); [Draffen v. Black](#), 302 Ky. 775, 196 S.W.2d 362 (1946).

- 2 Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952) (protection of the right of suffrage); California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 71 S. Ct. 601, 95 L. Ed. 788 (1951) (business of insurance); Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944); Illinois Cent. R. Co. v. Com., 305 Ky. 632, 204 S.W.2d 973 (1947).
- 3 Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993).
- 4 Macias v. Raul A. (Unknown), Badge No. 153, 23 F.3d 94 (5th Cir. 1994) (holding that a state statute requiring proof of automobile liability insurance is not unconstitutional on the ground that no federal law or constitutional provision addresses the issue, since the state has authority to create and enforce such laws and regulations under its police power).
- 5 State ex rel. Hughes v. Cleveland, 1943-NMSC-029, 47 N.M. 230, 141 P.2d 192 (1943); Kraus v. City of Cleveland, 55 Ohio Op. 6, 66 Ohio L. Abs. 417, 116 N.E.2d 779 (C.P. 1953), judgment aff'd, 55 Ohio Op. 36, 76 Ohio L. Abs. 214, 121 N.E.2d 311 (Ct. App. 8th Dist. Cuyahoga County 1954), judgment aff'd, 163 Ohio St. 559, 57 Ohio Op. 1, 127 N.E.2d 609 (1955) (fluoridation of water).
- 6 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934).
- 7 City of Mobile v. Rouse, 233 Ala. 622, 173 So. 266, 111 A.L.R. 349 (1937); Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3, 118 A.L.R. 486 (1938); State ex rel. Cleveringa v. Klein, 63 N.D. 514, 249 N.W. 118, 86 A.L.R. 1523 (1933).
- 8 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934); Ex parte Blaney, 30 Cal. 2d 643, 184 P.2d 892 (1947); East New York Sav. Bank v. Hahn, 293 N.Y. 622, 59 N.E.2d 625 (1944), judgment aff'd, 326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A.L.R. 1279 (1945).

End of Document

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16A Am. Jur. 2d Constitutional Law § 339

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

VIII. Police Power

A. In General

2. Who May Exercise Power

§ 339. Authority of states and political subdivisions to exercise police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  4.4(2), 21(2)

"Police power" is the authority of the state and its political subdivisions to impose restraints on private rights as necessary for the general welfare.¹ The police power under our constitutional system has been left to the states² and is normally vested in and exercised by the legislative branch or by political subdivisions of the state³ to which the legislature has made a proper delegation of its authority.⁴ Although a state may not surrender, abdicate, or abridge its police power,⁵ the authority may be delegated to municipalities and other governmental subdivisions, as these entities are part of the government structure of the state.⁶ The power is vested in the state and flows to the locality through a legislative grant.⁷ Both the state and its municipalities have a wide discretion in resorting to police power for the purpose of preserving public health, safety, and morals, or abating public nuisances.⁸ Thus, the government, through its police power, may promulgate ordinances to promote the health, safety, morals, or general welfare of its citizens.⁹

The police power has always belonged to the states, and was not surrendered by them to the general government or directly restricted by the Federal Constitution.¹⁰

The provisions of the Federal Constitution elevating federal treaties and statutes over state legislation apply fully to state police power regulations,¹¹ and thus, the police power of a state does not embrace a subject that has been vested exclusively to Congress by the Constitution,¹² nor can it defeat or impair a statute duly enacted by Congress.¹³

Footnotes

- 1 [C and R Stacy, LLC v. County of Chisago](#), 742 N.W.2d 447 (Minn. Ct. App. 2007).
The "police power" of the Commonwealth, in the context of the constitutional provision prohibiting the abridgement of that power, is best described as the Commonwealth's inherent power, as a sovereign, to enact laws to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. [Elizabeth River Crossings OpCo, LLC v. Meeks](#), 286 Va. 286, 749 S.E.2d 176 (2013).
- 2 [City of Newport, Ky. v. Iacobucci](#), 479 U.S. 92, 107 S. Ct. 383, 93 L. Ed. 2d 334 (1986) (abrogated on other grounds by, [44 Liquormart, Inc. v. Rhode Island](#), 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996)); [McInerney v. Ervin](#), 46 So. 2d 458 (Fla. 1950); [Bruck v. State ex rel. Money](#), 228 Ind. 189, 91 N.E.2d 349 (1950); [State ex rel. Morris v. West Virginia Racing Commission](#), 133 W. Va. 179, 55 S.E.2d 263 (1949).
- 3 [City of New Orleans v. Board of Com'rs of Orleans Levee Dist.](#), 640 So. 2d 237 (La. 1994) (holding that the inalienability of the police power does not preclude its delegation to municipalities and other governmental subdivisions, as those entities are part of the total government of the state).
As to the exercise of the police power by municipal corporations, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 369 to 422](#).
- 4 [Cary v. City of Rapid City](#), 1997 SD 18, 559 N.W.2d 891 (S.D. 1997).
- 5 § 337.
- 6 [Azalea Lakes Partnership v. Parish of St. Tammany](#), 859 So. 2d 57 (La. Ct. App. 1st Cir. 2003), writ denied, 858 So. 2d 429 (La. 2003).
- 7 [The City of San Antonio v. TPLP Office Park Properties, Ltd.](#), 155 S.W.3d 365 (Tex. App. San Antonio 2004), review granted, judgment rev'd on other grounds, 218 S.W.3d 60 (Tex. 2007).
- 8 [C and R Stacy, LLC v. County of Chisago](#), 742 N.W.2d 447 (Minn. Ct. App. 2007).
- 9 [Curious Theater Co. v. Colorado Dept. of Public Health and Environment](#), 216 P.3d 71 (Colo. App. 2008), judgment aff'd, 220 P.3d 544 (Colo. 2009).
- 10 [Brewer v. Valk](#), 204 N.C. 186, 167 S.E. 638, 87 A.L.R. 237 (1933); [State ex rel. Williams v. Glander](#), 148 Ohio St. 188, 35 Ohio Op. 192, 74 N.E.2d 82 (1947); [Hyde v. Albert E. Peirce & Co.](#), 147 Or. 5, 31 P.2d 755 (1934); [State ex rel. Morris v. West Virginia Racing Commission](#), 133 W. Va. 179, 55 S.E.2d 263 (1949).
- 11 [Morris v. Jones](#), 329 U.S. 545, 67 S. Ct. 451, 91 L. Ed. 488, 168 A.L.R. 656 (1947); [State v. Arthur](#), 74 Idaho 251, 261 P.2d 135 (1953).
- 12 [City of Burbank v. Lockheed Air Terminal Inc.](#), 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973); [Schipa v. West Virginia Liquor Control Commission](#), 132 W. Va. 51, 53 S.E.2d 609, 9 A.L.R.2d 1284 (1948).
- 13 [U. S. v. City of Chester](#), 144 F.2d 415 (C.C.A. 3d Cir. 1944).

End of Document

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16A Am. Jur. 2d Constitutional Law § 340

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

2. Who May Exercise Power

§ 340. Authority of states and political subdivisions to exercise police power—Exercise by legislature

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power of the states is generally vested in and exercised by the legislative branch of state government.¹ The power of the legislature is extremely broad and is subject only to the requirements of reasonableness² and appropriateness of the means³ and to the limitations of the Federal and State Constitutions.⁴ Within constitutional limits, the legislative branch is the sole judge of laws that should be enacted for the protection and welfare of the people and of when and how the police power of the state is to be exercised.⁵ However, a legislature may not, under the guise of regulating in the public interest, impose conditions that are facially unreasonable, arbitrary, discriminatory, or confiscatory.⁶

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Footnotes

- 1 [City of Lowell v. M & N Mobile Home Park, Inc.](#), 323 Ark. 332, 916 S.W.2d 95 (1996).
It is for the legislature to determine what regulations, restraints, or prohibitions are reasonably required to protect the public safety without abrogation of basic and substantial individual liberty interests. [Peppies Courtesy Cab Co. v. City of Kenosha](#), 165 Wis. 2d 397, 475 N.W.2d 156 (1991).
- 2 §§ 370, 371.
- 3 §§ 372, 373.
- 4 §§ 378 to 399.

- 5 [State v. Ivey](#), 196 W. Va. 571, 474 S.E.2d 501 (1996).
- 6 [Central Platte Natural Resources Dist. v. City of Fremont](#), 250 Neb. 252, 549 N.W.2d 112 (1996); [Peppies Courtesy Cab Co. v. City of Kenosha](#), 165 Wis. 2d 397, 475 N.W.2d 156 (1991).

End of Document

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16A Am. Jur. 2d Constitutional Law § 341

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

A. In General

2. Who May Exercise Power

§ 341. Authority of states and political subdivisions to exercise police power —Exercise by governmental branches or departments other than legislature

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

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[Comment Note.—President's power to seize private property in emergency, in absence of statutory authority, 26 A.L.R.2d 1444](#)

Under proper circumstances, the police power may be exercised by the executive department.¹ However, under the Federal Constitution, the lawmaking power of Congress is not subject to presidential or military supervision or control.² The attorney general is one of the executive officers of the state who may exercise the police power under proper circumstances. In the exercise of the police power of the state, the legislature may delegate to the attorney general any such legal, administrative, or executive duties as it deems best and which are not otherwise delegated by the state constitution.³

Under proper circumstances, the courts may make orders involving exercise of the police power.⁴ Generally, however, a court will rarely, if ever, originally exercise a police power, its function being rather to review the exercise of police power by the legislature or an agency which has been delegated the power.⁵

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Footnotes

- 1 [Southern Bell Tel. & Tel. Co. v. State ex rel. Ervin](#), 75 So. 2d 796 (Fla. 1954).
- 2 [Youngstown Sheet & Tube Co. v. Sawyer](#), 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952) (holding that an executive order directing the Secretary of Commerce to seize the plants of steel companies involved in a labor dispute was invalid as exceeding the constitutional authority of the President).
- 3 [State ex rel. Doerfler v. Price](#), 101 Ohio St. 50, 128 N.E. 173 (1920).
- 4 [Petition of Florida State Bar Ass'n](#), 40 So. 2d 902 (Fla. 1949) (holding that the state supreme court, as an incident to its inherent power to integrate the bar, may impose a membership fee for the support of bar integration activities).
- 5 [Schmidt v. Flynn](#), 200 N.Y.S.2d 1009 (Sup 1960).

End of Document

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16A Am. Jur. 2d Constitutional Law § 342

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

A. In General

2. Who May Exercise Power

§ 342. Authority of states and political subdivisions to exercise police power —Delegation of power to private persons, corporations, or public agencies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

Since generally the legislature may not delegate its legislative powers to private individuals, associations, or corporations,¹ the legislature lacks authority to delegate the exercise of the police powers to a private corporation or private citizen² to be used for private purposes as distinguished from a public purpose, particularly where there is no state supervision.³ The police power is so inextricably bound to state sovereignty that it is beyond the power of a state to divest itself of its right and duty in respect of the full exercise of this power, including by delegating police power to a nonsovereign entity.⁴ However, a governmental unit does not abdicate its police power by merely contracting with private persons to implement police power functions.⁵

Wherever a legislature has the right to accomplish a certain result and that result is best attained by means of a corporation, it has the right to create such a corporation and to endow it with the powers necessary to effect the desired and lawful purpose.⁶ Thus, a state may use a private corporation and confer upon it necessary powers to carry into effect police regulations.⁷ It may also create a governmental agency for the enforcement of its police powers.⁸

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Footnotes

¹ §§ 323 to 325.

- 2 State ex rel. Rouveyrol v. Donnelly, 365 Mo. 686, 285 S.W.2d 669 (1956).
3 Liquor Store v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).
4 State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006) (holding that
the legislature did not exceed its constitutional authority when it conferred statewide authority on a state
college police force).
5 Ward v. Louisville & N. R. Co., 402 S.W.2d 98 (Ky. 1966) (involving a contract by the state department
of highways with a railroad involving the use of highway department funds for the maintenance expense
incident to electric warning signals and gates at grade crossings on railroad tracks over public highways).
6 Louisville Gas Co. v. Citizens' Gaslight Co., 115 U.S. 683, 6 S. Ct. 265, 29 L. Ed. 510 (1885); Henderson v.
Heyward, 109 Ga. 373, 34 S.E. 590 (1899); Overshiner v. State, 156 Ind. 187, 59 N.E. 468 (1901); Scholle
v. State, 90 Md. 729, 46 A. 326 (1900); Commonwealth v. Vrooman, 164 Pa. 306, 30 A. 217 (1894).
7 Leigh v. Green, 193 U.S. 79, 24 S. Ct. 390, 48 L. Ed. 623 (1904); Davidson v. City of New Orleans, 96
U.S. 97, 24 L. Ed. 616, 1877 WL 18471 (1877); Slaughter-House Cases, 83 U.S. 36, 21 L. Ed. 394, 1872
WL 15386 (1872).
8 Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939); City of Huntington v. State Water Commission,
137 W. Va. 786, 73 S.E.2d 833 (1953).

End of Document

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16A Am. Jur. 2d Constitutional Law § 343

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

A. In General

2. Who May Exercise Power

§ 343. Authority of Federal Government to exercise police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The regulation of health and safety is primarily and historically a matter of local concern.¹ Every law enacted by Congress must be based on one or more of its specific powers enumerated in the Constitution.² Although Congress has no general power to enact police regulations that operate within the state,³ the Federal Government may set uniform national standards in these areas⁴ when empowered under specific grants of constitutional authority.⁵

The exercise of the police power by a state is beyond interference by the Federal Government, except by virtue of some authority derived from the Federal Constitution.⁶ Federal deference in matters within the states' police power represents a constitutionally derived recognition of the essential character of state government within the federal system rather than merely a policy of comity toward the states.⁷

Observation:

The Federal Government has repeatedly exercised legislative powers within the sphere of general powers granted to it by the Constitution which are typical of what would, in the case of a state, be designated as "police powers." Once it is assumed that the general subject of a controversy is properly within the scope of the enumerated powers granted to the Federal Government,

that government has broad powers to prescribe police regulations concerning those subjects just as a state government would have concerning a subject within its reserved powers.⁸

States have broad police powers reserved to them under the Constitution to determine their local policies and enforcement priorities pursuant to the 10th Amendment.⁹ The limitations in the 10th Amendment¹⁰ on the powers of the Federal Government deprives that government of the right to exercise police powers only to the extent that the exercise of such powers may not be connected or associated with one of the powers expressly or by necessary implication granted to that government. Thus, it is not that the United States has no police power, but that the United States possesses whatever police power is appropriate to the exercise of any attribute of sovereignty specifically granted it by the Constitution.¹¹ If Congress acts under one of its enumerated powers, there can be no violation of the 10th Amendment.¹² Thus, the Residual Powers Clause of the 10th Amendment did not provide a basis for striking down a statute that prohibits a person who is subject to a domestic violence restraining order from possessing a firearm where Congress acted within the scope of its powers under the Commerce Clause in enacting the law.¹³

Under the power of Congress to regulate interstate and foreign commerce and under other powers such as the war power, the power over mails, and the power over federal lands, regulatory measures have been validly adopted which are directly analogous to the police power exercised by state legislatures.¹⁴ Thus, a federal power corresponding to the police power of the states arises under the general welfare provision¹⁵ of the Federal Constitution.¹⁶ Moreover, since Congress has the constitutional authority to make all needful rules and regulations respecting the territory or other property belonging to the United States,¹⁷ this power of the United States, "analogous to the police power of the state," clearly applies where the lands of the United States are concerned.¹⁸ Similarly, although owners of unpatented mining claims hold fully recognized possessory interests in their claims, the United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which public lands can be used and acquired.¹⁹

The Necessary and Proper Clause confers upon Congress that discretion, with respect to the means by which the powers the Constitution confers are to be carried into execution, which will enable that body to perform the high duties assigned to it.²⁰ Thus, although Congress may not authorize the pretrial civil commitment of a criminal suspect simply to protect the general welfare of the community at large, it may impose such commitment when it is necessary and proper to the exercise of some specifically enumerated federal authority.²¹ In other words, while the Federal Government is one of enumerated powers, which means that every law enacted by Congress must be based on one or more of those powers, at the same time, a government entrusted with such powers must also be entrusted with ample means for their execution, and accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful, or conducive to the authority's beneficial exercise.²² For instance, a federal statute²³ allowing a district court to order the civil commitment, beyond the date the prisoner would otherwise be released, of a sexually dangerous federal prisoner is constitutional under the Necessary and Proper Clause, in light of the breadth of that clause, the long history of federal involvement in delivering mental health care to federal prisoners and in providing for their civil commitment, the sound reasons for the statute's enactment in light of the government's custodial interest in safeguarding the public from dangers posed by those in federal custody, the statute's accommodation of state interests, which included requiring the Attorney General to encourage the state in which the individual was tried, or the state of domicile, to take custody of the prisoner, and the statute's narrow scope, as reflected by the fact that it had been applied to only a small fraction of federal prisoners.²⁴

Footnotes

- 1 [Gonzales v. Oregon](#), 546 U.S. 243, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006).
- 2 [U.S. v. Morrison](#), 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).
- 3 [Slaughter-House Cases](#), 83 U.S. 36, 21 L. Ed. 394, 1872 WL 15386 (1872); [Shealy v. Southern Ry. Co.](#), 127 S.C. 15, 120 S.E. 561 (1924); [Ex parte Guerra](#), 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560 (1920).
- 4 [Gonzales v. Oregon](#), 546 U.S. 243, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006).
- 5 [U.S. v. Perry](#), 788 F.2d 100 (3d Cir. 1986).
- 6 [U.S. v. Perry](#), 788 F.2d 100 (3d Cir. 1986) (upholding a federal pretrial detention statute under congressional power to proscribe certain drug actions and the use of firearms in the commission of federal offenses).
- 7 [Ensminger v. C. I. R.](#), 610 F.2d 189 (4th Cir. 1979).
- 8 [Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.](#), 299 U.S. 334, 57 S. Ct. 277, 81 L. Ed. 270 (1937); [Walton v. House of Representatives of State of Okl.](#), 265 U.S. 487, 44 S. Ct. 628, 68 L. Ed. 1115 (1924); [Zakonaite v. Wolf](#), 226 U.S. 272, 33 S. Ct. 31, 57 L. Ed. 218 (1912); [Craig v. Steele](#), 123 F. Supp. 153 (W.D. Mo. 1954).
The states have broad authority to enact legislation for the public good, i.e., what has often been called a "police power," but the Federal Government, by contrast, has no such authority and can exercise only the powers granted to it, including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers. [Bond v. U.S.](#), 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014).
- 9 [State ex rel. Becerra v. Sessions](#), 284 F. Supp. 3d 1015 (N.D. Cal. 2018).
- 10 [U.S. Const. Amend. X](#).
- 11 [U.S. v. Gaffney](#), 10 F.2d 694 (C.C.A. 2d Cir. 1926).
- 12 [U.S. v. Jones](#), 231 F.3d 508 (9th Cir. 2000).
- 13 [U.S. v. Jones](#), 231 F.3d 508 (9th Cir. 2000).
- 14 [Reina v. U.S.](#), 364 U.S. 507, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960); [Cleveland v. U.S.](#), 329 U.S. 14, 67 S. Ct. 13, 91 L. Ed. 12 (1946); [Federal Power Commission v. Natural Gas Pipeline Co. of America](#), 315 U.S. 575, 62 S. Ct. 736, 86 L. Ed. 1037 (1942); [Nick v. U.S.](#), 122 F.2d 660, 138 A.L.R. 791 (C.C.A. 8th Cir. 1941); [Clark v. U.S.](#), 184 F.2d 952 (10th Cir. 1950) (bank robbery statute).
- 15 [U.S. Const. Art. I, § 8, cl. 1](#) ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").
- 16 [First Federal Savings & Loan Ass'n of Wisconsin v. Loomis](#), 97 F.2d 831, 121 A.L.R. 99 (C.C.A. 7th Cir. 1938); [Oklahoma City v. Sanders](#), 94 F.2d 323, 115 A.L.R. 363 (C.C.A. 10th Cir. 1938).
- 17 [U.S. Const. Art. IV, § 3, cl. 2](#).
- 18 [Kleppe v. New Mexico](#), 426 U.S. 529, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976); [State of Tenn. v. U.S.](#), 256 F.2d 244 (6th Cir. 1958).
- 19 [U.S. v. Locke](#), 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (holding that claimants must take their mineral interests with knowledge that the Federal Government retains substantial regulatory power over those interests).
- 20 [Armstrong v. Exceptional Child Center, Inc.](#), 575 U.S. 320, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015).
The Necessary and Proper Clause allows Congress to adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. [U.S. v. Kebodeaux](#), 570 U.S. 387, 133 S. Ct. 2496, 186 L. Ed. 2d 540 (2013).
- 21 [U.S. v. Perry](#), 788 F.2d 100 (3d Cir. 1986) (holding that civil commitment is permissible to prevent violation of federal criminal statutes).
- 22 [U.S. v. Comstock](#), 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878, 65 A.L.R. Fed. 2d 667 (2010).
- 23 18 U.S.C.A. § 4248.
- 24 [U.S. v. Comstock](#), 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878, 65 A.L.R. Fed. 2d 667 (2010).

16A Am. Jur. 2d Constitutional Law VIII B Refs.

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VIII. Police Power

B. Exercise of Police Power

[Topic Summary](#) | [Correlation Table](#)

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16A Am. Jur. 2d Constitutional Law § 344

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VIII. Police Power

B. Exercise of Police Power

1. In General

§ 344. General scope of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  4.4(2), 21(2)

While the scope of the police power is quite extensive, it must still always be borne in mind that such power can only be exercised for proper purposes, having reference to the protection of the public welfare, health, safety, or morals¹ and within the limitations that generally apply.² Protection of the public health, safety, morals, and general welfare are the goals commonly included as within the lawful scope of the state's police powers.³

The foundation of the states' police power is the control and regulation of private interests for the public good.⁴ It embraces the protection of lives and property for the public health and welfare, the maintenance of good order for public safety, and the preservation of good morals.⁵ Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the general public require its exercise and the means of restriction must not be unduly oppressive upon individuals.⁶ The state's police power cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past because as society becomes increasingly complex and advanced, the police power must of necessity evolve, develop, and expand in the public interest to meet those conditions.⁷

The breadth and adaptability of the police power⁸ as well as its power to cover the public needs⁹ are of the greatest significance in determining the objects to which it extends. Thus, even though it may be difficult to formulate a satisfactory definition of the term "police power," the power certainly extends to protecting the lives, health, and property of the citizens to the preservation of good order and the public morals.¹⁰ The police power also reaches the restraint and punishment of crime,¹¹ the protection

of wildlife,¹² and the preservation of the general welfare of the community.¹³ In general, it extends to the enactment of all such wholesome and reasonable laws not in conflict with the Constitution of the state or the United States as may be deemed conducive to the public good.¹⁴

Similarly, the term "general welfare" means that legislation, to be justified and supported by that term, must at least promote the welfare of the general public as contrasted with that of a small percentage or insignificant numerical proportion of the citizenry.¹⁵ However, it is not essential that the act relate to every member of the public.¹⁶ Education is one of the purposes for which the police power may be exercised.¹⁷

The police power is frequently relied on to sustain laws that affect the common good in only an indirect way.¹⁸ The ramifications of modern economic and social conditions have enlarged the conditions under which the police power may be exercised for the purpose of suppressing practices that are repugnant to the morals, health, or welfare of the country.¹⁹ On the other hand, an exercise of the police power will not be upheld where its use tends only to create a monopoly or special privilege and does not tend to preserve the public health, safety, or welfare.²⁰

State legislatures, exercising their plenary police powers, are not limited to Congress's enumerated powers.²¹

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Footnotes

- 1 Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 170 P.3d 508 (2007); Marcus Associates, Inc. v. Town of Huntington, 45 N.Y.2d 501, 410 N.Y.S.2d 546, 382 N.E.2d 1323 (1978).
Police power is as extensive as may be required for the protection of the public health, safety, morals, and general welfare. Nies v. Town of Emerald Isle, 244 N.C. App. 81, 780 S.E.2d 187 (2015).
As to the purposes of the exercise of the power, generally see §§ 346 to 354.
- 2 §§ 368, 369.
- 3 State v. Lilley, 171 N.H. 766, 204 A.3d 198 (2019), cert. denied, 140 S. Ct. 858 (2020); Massey v. Hoffman, 184 N.C. App. 731, 647 S.E.2d 457 (2007).
- 4 Bittle v. Bahe, 2008 OK 10, 192 P.3d 810 (Okla. 2008) (overruled on other grounds by, Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, 315 P.3d 359 (Okla. 2013)).
- 5 Bittle v. Bahe, 2008 OK 10, 192 P.3d 810 (Okla. 2008) (overruled on other grounds by, Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, 315 P.3d 359 (Okla. 2013)).
- 6 State ex rel. Pizza v. Rezcallah, 84 Ohio St. 3d 116, 1998-Ohio-313, 702 N.E.2d 81 (1998).
- 7 Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007).
- 8 § 336.
- 9 § 338.
- 10 St. Louis & S.F.R. Co. v. Mathews, 165 U.S. 1, 17 S. Ct. 243, 41 L. Ed. 611 (1897); Shea v. Olson, 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936), adhered to on reh'g en banc, 186 Wash. 700, 59 P.2d 1183 (1936).
- 11 Sutton v. State of New Jersey, 244 U.S. 258, 37 S. Ct. 508, 61 L. Ed. 1117 (1917).
- 12 State v. Walsh, 123 Wash. 2d 741, 870 P.2d 974 (1994) (holding that a "spotlighting" statute, which prohibited the hunting of big game with artificial light, was a reasonable regulation of conduct under the state's police power rather than an impermissible infringement on the defendant's Second Amendment right to bear arms).
- 13 § 346.
- 14 City of Seattle v. Jones, 3 Wash. App. 431, 475 P.2d 790 (Div. 1 1970), judgment aff'd, 79 Wash. 2d 626, 488 P.2d 750 (1971).
- 15 State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 29 (1953); State Board of Barber Examiners v. Cloud, 220 Ind. 552, 44 N.E.2d 972 (1942).

- 16 [Wilson v. City of Zanesville](#), 130 Ohio St. 286, 4 Ohio Op. 311, 199 N.E. 187 (1935) (overruled in part on
other grounds by, [City of Cincinnati v. Correll](#), 141 Ohio St. 535, 26 Ohio Op. 116, 49 N.E.2d 412 (1943)).
- 17 [Interstate Consol. St. Ry. Co. v. Commonwealth of Massachusetts](#), 207 U.S. 79, 28 S. Ct. 26, 52 L. Ed. 111
(1907); [Immediato v. Rye Neck School Dist.](#), 73 F.3d 454, 106 Ed. Law Rep. 85 (2d Cir. 1996) (upholding a
mandatory community service program as reasonably related to the state's legitimate function of educating
its students, so that the program did not violate parents' substantive due process rights); [Bowker v. Baker](#),
73 Cal. App. 2d 653, 167 P.2d 256 (4th Dist. 1946).
- 18 [Shea v. Olson](#), 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936), adhered to on reh'g en banc, 186 Wash.
700, 59 P.2d 1183 (1936).
- 19 [McInerney v. Ervin](#), 46 So. 2d 458 (Fla. 1950).
- 20 [Palmer v. Smith](#), 229 N.C. 612, 51 S.E.2d 8 (1948) (upholding regulation of optometry).
- 21 [Torres v. Lynch](#), 136 S. Ct. 1619, 194 L. Ed. 2d 737 (2016).

End of Document

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16A Am. Jur. 2d Constitutional Law § 345

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

B. Exercise of Police Power

1. In General

§ 345. Necessity that public benefit be commensurate with private detriment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  4.4(2), 21(2)

To be truly in the public welfare, and thus, superior to private property rights, legislation must confer upon the public benefits commensurate with its burdens upon private property.¹ The police power does not justify an interference with constitutional rights that is entirely out of proportion to any benefit redounding to the public.²

It is only because the welfare of the whole people so far outweighs the importance of the individual whose rights are interfered with by an exercise of the police power that such interference with constitutional guaranties can be justified.³ Thus, the imposition of unreasonable burdens or expenses on persons or property may affect the constitutionality of a statute enacted under the police power.⁴

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Footnotes

- 1 [Direct Plumbing Supply Co. v. City of Dayton](#), 138 Ohio St. 540, 21 Ohio Op. 422, 38 N.E.2d 70, 137 A.L.R. 1058 (1941).
- 2 [Town of Bay Harbor Islands v. Schlapik](#), 57 So. 2d 855 (Fla. 1952); [Appeal of Meserve](#), 120 N.H. 461, 417 A.2d 11 (1980); [Myers v. City of Defiance](#), 67 Ohio App. 159, 21 Ohio Op. 165, 31 Ohio L. Abs. 636, 36 N.E.2d 162 (3d Dist. Defiance County 1940).
- 3 [Town of Bay Harbor Islands v. Schlapik](#), 57 So. 2d 855 (Fla. 1952).

4

§ 388.

End of Document

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16A Am. Jur. 2d Constitutional Law § 346

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 346. Police power exercised for general welfare

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The legislature has the power to enact legislation for the general welfare.¹ The concept of public welfare is broad and inclusive, and the values it protects are spiritual as well as physical, aesthetic as well as monetary.² The meaning of the term "general welfare" is as incapable of specific definition as is the police power itself.³ The public welfare embraces a variety of interests calling for public care and control. These are the primary social interests of safety, order and morals, economic interests, and nonmaterial and political interests.⁴

The general rule is well settled by many decisions dealing with widely varied specific subjects that the police power extends to the enactment of laws which promote the public welfare.⁵ Accordingly, regulation under the police power is supportable if it is reasonably applied and promotes community development.⁶ Through the exercise of its police power, the legislature determines what is necessary for the peace and welfare of the people.⁷

The traditional exercise of the states' police powers is to protect the health and safety of their citizens.⁸ A statute is within constitutional limits if it is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety, and general welfare.⁹ Legislation that is necessary or appropriate to protect the general welfare of the people and is reasonable in its operation and effect is a valid exercise by the legislature of the police power.¹⁰

Observation:

The mere fact that a governmental act benefits a private party does not necessarily mean that it does not also advance the public welfare. Where different persons have incompatible interests in the same property, the state can legitimately exercise its police power to protect the interest that matters most to the public welfare, even at the cost of the uncompensated destruction of other interests.¹¹

A proper general welfare purpose may exist where it is sought to serve the future, as distinguished from the present, welfare of the public.¹² Legislation is not, however, valid per se merely because it was enacted in the name of the public welfare.¹³

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Footnotes

- 1 State v. Chvala, 2003 WI App 257, 268 Wis. 2d 451, 673 N.W.2d 401 (Ct. App. 2003).
- 2 Hendricks v. Com., 865 S.W.2d 332 (Ky. 1993); Hudson County News Co. v. Sills, 41 N.J. 220, 195 A.2d 626 (1963); Gail Turner Nurses Agency, Inc. v. State, 17 Misc. 2d 273, 190 N.Y.S.2d 720 (Sup 1959); Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 27 Ohio Op. 2d 388, 200 N.E.2d 328 (1964).
- 3 Hart v. City of Beverly Hills, 11 Cal. 2d 343, 79 P.2d 1080 (1938); Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Or. 281, 330 P.2d 5, 74 A.L.R.2d 347 (1958).
- As to the difficulty of defining the police power, see § 333.
- 4 State v. Hutchinson Ice Cream Co., 168 Iowa 1, 147 N.W. 195 (1914), aff'd, 242 U.S. 153, 37 S. Ct. 28, 61 L. Ed. 217 (1916).
- 5 California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 71 S. Ct. 601, 95 L. Ed. 788 (1951); People v. Thomas, 171 Ill. 2d 207, 215 Ill. Dec. 679, 664 N.E.2d 76 (1996); The Payphone Assn. of Ohio v. Cleveland, 146 Ohio App. 3d 319, 766 N.E.2d 167 (8th Dist. Cuyahoga County 2001); A & W Properties, Inc. v. Kansas City Southern Ry. Co., 200 S.W.3d 342 (Tex. App. Dallas 2006); State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006); Hartley Hill Hunt Club v. County Com'n of Ritchie County, 220 W. Va. 382, 647 S.E.2d 818 (2007); State v. Cole, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 (2003).
- 6 State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962 (1933).
- 7 Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, 148 P.3d 842 (Okla. 2006), as corrected, (Nov. 6, 2006).
- 8 Diamond S.J. Enterprise, Inc. v. City of San Jose, 395 F. Supp. 3d 1202 (N.D. Cal. 2019); People v. Austin, 2019 IL 123910, 2019 WL 5287962 (Ill. 2019); State ex rel. Yost v. Volkswagen Aktiengesellschaft, 2019-Ohio-5084, 137 N.E.3d 1267 (Ohio Ct. App. 10th Dist. Franklin County 2019), appeal allowed, 2020-Ohio-1090, 2020 WL 1522745 (Ohio 2020); Lovett v. State, 523 S.W.3d 342 (Tex. App. Fort Worth 2017), petition for discretionary review refused, (Oct. 18, 2017).
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- As to the protection of the environment or ecology, see § 353.
- 11 Murphy v. Amoco Production Co., 729 F.2d 552 (8th Cir. 1984).
- 12 Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110 (1938).

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 347. Police power exercised for physical welfare and public safety, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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[Validity of state statute proscribing possession or carrying of knife](#), 47 A.L.R.4th 651

[Validity of state statutes restricting right of aliens to bear arms](#), 28 A.L.R.4th 1096

The police power of the state includes the authority to enact regulations for the safety and welfare of the people¹ and one of the most important fields of legislation in which a state may enact measures is regulation in the interest of public safety.² Indeed, legislative concern for public safety is a mandate.³ A basic principle of federalism is that each state may make its own reasoned

judgment about what conduct is permitted or proscribed within its borders, and each state alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.⁴

The power to enact police measures in relation to matters of public safety is a continuing one, and thus, merely because the state has tolerated conditions inimical to the public health and safety in the past, it is not precluded from taking appropriate steps to end them in the future.⁵ While a state may exercise its police power to enact a statute promoting public safety or welfare, the state may not exercise its police power in a manner repugnant to the fundamental constitutional rights guaranteed to all citizens.⁶ It is for the legislature to determine what regulations, restraints, or prohibitions are reasonably required to protect the public safety without abrogating basic and substantial individual liberty interests.⁷

Observation:

A variety of public safety and welfare regulations dealing with a number of diverse topics has been held constitutional. Thus, while information maintained by the state in a list of suspected child abusers may be damaging to a person's reputation if revealed publicly, keeping it is a legitimate exercise of the state's police powers and does not raise constitutional concerns.⁸ It is within a state's police powers to reasonably regulate any who use public roads in order to protect the welfare and safety of the general public.⁹ Firearm controls are within the ambit of the state's police power.¹⁰ A state or locality may validly pass an ordinance banning the manufacture, sale, or possession of dangerous weapons, as the measure is reasonably related to the legitimate governmental interest of preventing crime and ensuring public safety, and thus, is a valid exercise of the police power which does not violate the right to bear arms in self-defense.¹¹ State statutes banning the possession of bump stocks or other rapid fire trigger activators for semiautomatic rifles are not takings that would require just compensation, and instead are a legitimate exercise of the state's traditional police power to regulate for public safety by defining and banning ultra-hazardous contraband.¹²

An act is within the state's police power if it is reasonably related to a legitimate governmental interest in the public's safety and welfare,¹³ and the state has a prerogative to safeguard its citizens from potential harm that outweighs the interests of the individual.¹⁴ In furthering the objectives of promoting the safety and welfare of the public, the state may subject persons and property to restraints and burdens, even when "natural rights" are impaired.¹⁵ Thus, the Federal Constitution does not recognize any absolute and uncontrollable liberty, and the society is thus free to enact laws against evils that threaten the safety and welfare of the people.¹⁶

Observation:

Those who challenge bona fide state safety regulations must overcome a strong presumption favoring the measure's validity.¹⁷

Absent some involvement of a fundamental right or suspect classification, a legislative act is a valid exercise of the police power if the act is rationally related to some legitimate governmental purpose.¹⁸ Thus, social or economic legislation that purports to

protect the welfare and safety of citizens is presumed to be valid and not violate due process or equal protection if the statutory classification drawn by the statute is rationally related to a legitimate state interest. The general rule does not apply when the statute involves a suspect classification such as race, alienage, or national origin, or a "quasi-suspect" classification such as gender and illegitimacy, or if the statute affects personal and fundamental rights.¹⁹

The fact that state regulation may affect interstate commerce does not necessarily render it invalid, as the Constitution, when conferring upon Congress the power to regulate commerce, never intended to preclude the states from legislating on all subjects relating to the lives and safety of their citizens merely because the legislation might indirectly affect interstate commerce.²⁰ Indeed, few constitutional questions can arise over laws enacted to secure and maintain the safety of the populace, apart from challenges to the mode of exercise and extent of application of those laws.²¹ Under its police power the state may require elimination of a significant danger to life and property or may impose upon those responsible for the danger an absolute duty to safeguard against it.²² However, a legislative body may not abuse its police power by attempting to justify a measure through vague references to safety hazards in its regulations.²³

A state's ability to regulate its internal law enforcement activities is a quintessential police power.²⁴ Also, a state has a sovereign interest in its exercise of sovereign power over individuals and entities within the relevant jurisdiction, which can be articulated as the power to create and enforce a legal code, both criminal and civil.²⁵

Fire control is a proper function of the state's police power.²⁶ Thus, fire control in rural areas, though a matter of local concern, is within the police power of the state.²⁷ Smoking may be prohibited in certain places as a safety measure to prevent fire or explosion.²⁸

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Footnotes

- 1 [Frye v. Kansas City Missouri Police Dept.](#), 375 F.3d 785 (8th Cir. 2004); [Lincoln v. Holt](#), 215 Ariz. 21, 156 P.3d 438 (Ct. App. Div. 1 2007); [Wiser v. State](#), Dept. of Commerce, 2006 MT 20, 331 Mont. 28, 129 P.3d 133 (2006); [People v. Weinberg](#), 142 Misc. 2d 608, 537 N.Y.S.2d 1003 (J. Ct. 1988); [State v. Anderson](#), 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991).
- 2 [Berman v. Parker](#), 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); [Queenside Hills Realty Co. v. Saxl](#), 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946); [Frye v. Kansas City Missouri Police Dept.](#), 375 F.3d 785 (8th Cir. 2004); [Hawaii Insurers Council v. Lingle](#), 120 Haw. 51, 201 P.3d 564 (2008); [Lacy v. State](#), 903 N.E.2d 486 (Ind. Ct. App. 2009); [State ex rel. Koster v. Olive](#), 282 S.W.3d 842 (Mo. 2009); [People v. Weinberg](#), 142 Misc. 2d 608, 537 N.Y.S.2d 1003 (J. Ct. 1988); [The Payphone Assn. of Ohio v. Cleveland](#), 146 Ohio App. 3d 319, 766 N.E.2d 167 (8th Dist. Cuyahoga County 2001); [Liberty Mut. Ins. Co. v. Texas Dept. of Ins.](#), 187 S.W.3d 808 (Tex. App. Austin 2006); [Bittinger v. Corporation of Bolivar](#), 183 W. Va. 310, 395 S.E.2d 554 (1990).
- 3 [The Payphone Assn. of Ohio v. Cleveland](#), 146 Ohio App. 3d 319, 766 N.E.2d 167 (8th Dist. Cuyahoga County 2001).
- 4 [Bullock v. Philip Morris USA, Inc.](#), 159 Cal. App. 4th 655, 71 Cal. Rptr. 3d 775 (2d Dist. 2008).
- 5 [Adamec v. Post](#), 273 N.Y. 250, 7 N.E.2d 120, 109 A.L.R. 1110 (1937).

- 6 [State v. Vawter](#), 136 N.J. 56, 642 A.2d 349 (1994) (holding a so-called "hate crimes" statute to be unconstitutional under the First Amendment); [State v. Thompkins](#), 75 Ohio St. 3d 558, 1996-Ohio-264, 664 N.E.2d 926 (1996).
- 7 [Peppies Courtesy Cab Co. v. City of Kenosha](#), 165 Wis. 2d 397, 475 N.W.2d 156 (1991).
- 8 [Lee TT. v. Dowling](#), 87 N.Y.2d 699, 642 N.Y.S.2d 181, 664 N.E.2d 1243 (1996).
- 9 [Blakely v. Andrade](#), 360 F. Supp. 3d 453 (N.D. Tex. 2019).
- 10 [State v. Weber](#), 2019-Ohio-916, 132 N.E.3d 1140 (Ohio Ct. App. 12th Dist. Clermont County 2019), appeal not allowed, 156 Ohio St. 3d 1452, 2019-Ohio-2780, 125 N.E.3d 941 (2019).
- 11 [Robertson v. City and County of Denver](#), 874 P.2d 325, 29 A.L.R.5th 837 (Colo. 1994); [State v. LaChapelle](#), 234 Neb. 458, 451 N.W.2d 689 (1990).
- 12 [Maryland Shall Issue v. Hogan](#), 353 F. Supp. 3d 400 (D. Md. 2018).
- 13 [Robertson v. City and County of Denver](#), 874 P.2d 325, 29 A.L.R.5th 837 (Colo. 1994); [People v. Thomas](#), 171 Ill. 2d 207, 215 Ill. Dec. 679, 664 N.E.2d 76 (1996); [City of Seattle v. Montana](#), 129 Wash. 2d 583, 919 P.2d 1218 (1996) (abrogated on other grounds by, [Yim v. City of Seattle](#), 194 Wash. 2d 682, 451 P.3d 694 (2019)).
- 14 [Jones v. State](#), 640 So. 2d 1084 (Fla. 1994).
- 15 [Price v. State](#), 622 N.E.2d 954 (Ind. 1993).
- 16 [State ex rel. Spire v. Strawberries, Inc.](#), 239 Neb. 1, 473 N.W.2d 428 (1991) (disapproved of on other grounds by, [American Amusements Co. v. Nebraska Dept. of Revenue](#), 282 Neb. 908, 807 N.W.2d 492 (2011)).
- 17 [Kassel v. Consolidated Freightways Corp. of Delaware](#), 450 U.S. 662, 101 S. Ct. 1309, 67 L. Ed. 2d 580 (1981).
[A presumption of validity attaches to all legislation, especially legislation relating to the police powers. \[Town of Hilton Head Island v. Fine Liquors, Ltd.\]\(#\), 302 S.C. 550, 397 S.E.2d 662 \(1990\).](#)
- 18 [State Dept. of Roads v. Popco, Inc.](#), 247 Neb. 440, 528 N.W.2d 281 (1995).
- 19 [International Paper Co. v. Town of Jay](#), 928 F.2d 480, 110 A.L.R. Fed. 867 (1st Cir. 1991); [State v. Two IGT Video Poker Games, Model FA 180](#), 237 Neb. 145, 465 N.W.2d 453 (1991) (disapproved of on other grounds by, [American Amusements Co. v. Nebraska Dept. of Revenue](#), 282 Neb. 908, 807 N.W.2d 492 (2011)).
- 20 [Huron Portland Cement Co. v. City of Detroit, Mich.](#), 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852, 78 A.L.R.2d 1294 (1960).
- 21 [Patrick v. Riley](#), 209 Cal. 350, 287 P. 455 (1930).
- 22 [Kalbfell v. City of St. Louis](#), 357 Mo. 986, 211 S.W.2d 911 (1948); [State v. Anacortes Veneer, Inc.](#), 57 Wash. 2d 886, 360 P.2d 341, 90 A.L.R.2d 863 (1961).
- 23 [Betty-June School, Inc. v. Young](#), 25 Misc. 2d 909, 201 N.Y.S.2d 692 (Sup 1960).
- 24 [United States v. California](#), 921 F.3d 865 (9th Cir. 2019).
- 25 [New York v. United States Department of Labor](#), 363 F. Supp. 3d 109 (D.D.C. 2019); [Utah Division of Consumer Protection v. Stevens](#), 398 F. Supp. 3d 1139 (D. Utah 2019).
- 26 [Brewer v. State](#), 341 P.3d 1107 (Alaska 2014); [Caddo-Bossier Parishes Port Com'n v. Arch Chemicals, Inc.](#), 830 So. 2d 498 (La. Ct. App. 2d Cir. 2002).
- 27 [Caddo-Bossier Parishes Port Com'n v. Arch Chemicals, Inc.](#), 830 So. 2d 498 (La. Ct. App. 2d Cir. 2002).
- 28 [City of Zion v. Behrens](#), 262 Ill. 510, 104 N.E. 836 (1914).
[Federal law provides for a penalty for violation by miners of certain smoking regulations. 30 U.S.C.A. § 820\(g\).](#)
[As to prohibitions on smoking in the interest of the public health, see § 349.](#)

16A Am. Jur. 2d Constitutional Law § 348

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 348. Police power exercised for public health

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

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[Validity, Construction, Application, and Effect of Master Settlement Agreement \(MSA\) Between Tobacco Companies and Various States, and State Statutes Implementing Agreement; Use and Distribution of MSA Proceeds, 25 A.L.R.6th 435](#)

[Validity, Construction, and Operation of Municipal Ordinances Proscribing or Restricting Smoking in Restaurants, 105 A.L.R.5th 333](#)

[Validity, construction, and application of restrictions on use or possession of tobacco products in correctional facilities, 66 A.L.R.5th 237](#)

[Validity, construction, and application of nonsmoking regulations, 65 A.L.R.4th 1205](#)

The preservation of the public health is a paramount end of the exercise of the police power of the state.¹ Thus, the broad power of a state to establish and enforce standards of conduct within its borders concerning health is a vital part of its police power.² The legislature has broad discretion to determine what is harmful to the public health.³ Accordingly, great latitude is allowed to the legislature in determining the character of laws intended to protect the public health, and how, when, and by whom they should be applied.⁴ States have great leeway as part of their police function to adopt summary procedures to protect the public's health.⁵

The broad power to establish and enforce standards of conduct concerning the health of everyone within its borders is a vital part of the state's police power.⁶ When the validity of a health regulation is challenged, the judicial standard is whether the regulation has some actual or reasonable relation to maintaining and promoting the public health, and whether health is in fact the end sought to be attained.⁷

Health regulations under the police power may cover many other subjects besides the health of human beings, such as inspection and quarantine regulations for goods, freight,⁸ animals, and livestock.⁹ The seizure and disposal of neglected animals falls squarely within the state's police power, is permissible without just compensation, is not a taking for a private purpose, and does not violate substantive due process.¹⁰

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Footnotes

- 1 [Lewis Food Co. v. State Dept. of Public Health](#), 110 Cal. App. 2d 759, 243 P.2d 802 (2d Dist. 1952); [City of Kansas City v. Jordan](#), 174 S.W.3d 25 (Mo. Ct. App. W.D. 2005).
The regulation of health matters is primarily, and historically, a matter of local concern, and therefore among those powers reserved to the states under the Tenth Amendment. [Steel Institute of New York v. City of New York](#), 832 F. Supp. 2d 310 (S.D. N.Y. 2011), judgment aff'd, 716 F.3d 31 (2d Cir. 2013).
As to protection of the environment or ecology, see § 353.
- 2 [Barsky v. Board of Regents of University](#), 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954); [Talley v. Northern San Diego County Hospital Dist.](#), 41 Cal. 2d 33, 257 P.2d 22 (1953) (overruled on other grounds by, [Muskopf v. Corning Hospital Dist.](#), 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961)).
A New York statute, popularly known as the "pooper scooper law," which requires each dog owner in cities with a population of 400,000 or more persons to "remove any feces left by the owner's dog on any sidewalk, gutter, street or other public area," is constitutional since the police power of the state may properly be invoked to require a more sanitary disposition of dog droppings on the streets and sidewalks of the major cities in the state in order to protect the public health, safety, and welfare; even if the statute is grounded solely on sanitation and aesthetics, it would still be upheld since a statute that proscribes conduct which is unnecessarily offensive to the sensibilities of the average person is a valid subject of regulation under the police power. [Schnapp v. Lefkowitz](#), 101 Misc. 2d 1075, 422 N.Y.S.2d 798 (Sup 1979).
- 3 [Com. v. Harrelson](#), 14 S.W.3d 541 (Ky. 2000) (holding that the legislature had a valid public interest in controlling marijuana by designating all parts of the plant species cannabis as controlled substances, and thus, the statute was not overbroad in including hemp and nonhallucinogenic plant parts in its scope).
- 4 [Ex parte Lauderdale County](#), 565 So. 2d 623 (Ala. 1990).
- 5 [Mackey v. Montrym](#), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (holding that a law mandating the suspension of a driver's license because of the refusal to take a breath-analysis test upon arrest for D.U.I., did not violate due process).
The power to act in furtherance of the public health and welfare may justify a moratorium on building permits or sewer attachments which are reasonably limited as to time. [Charles v. Diamond](#), 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977).
- 6 [Williamson v. Lee Optical of Oklahoma Inc.](#), 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955); [Berman v. Parker](#), 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); [Barsky v. Board of Regents of University](#), 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954); [Peachey v. Boswell](#), 240 Ind. 604, 167 N.E.2d 48, 89 A.L.R.2d 801 (1960); [Graham v. Reserve Life Ins. Co.](#), 274 N.C. 115, 161 S.E.2d 485 (1968); [Quesenberry v. Estep](#), 142 W. Va. 426, 95 S.E.2d 832 (1956); [City of Huntington v. State Water Commission](#), 137 W. Va. 786, 73 S.E.2d 833 (1953).
As to particular health measures and regulations, see [Am. Jur. 2d, Health §§ 35 to 97](#).
- 7 [State ex rel. Furman v. Searcy](#), 225 So. 2d 430 (Fla. 4th DCA 1969).
- 8 [Train v. Boston Disinfecting Co.](#), 144 Mass. 523, 11 N.E. 929 (1887).

- 9 [Am. Jur. 2d, Animals § 38.](#)
10 [Porter v. DiBlasio, 93 F.3d 301 \(7th Cir. 1996\).](#)

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16A Am. Jur. 2d Constitutional Law § 349

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 349. Police power exercised for public health—Smoking regulations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power of the state to prohibit smoking in close and confined places, such as theaters and public conveyances, has been recognized.¹ Modern authorities have upheld broad prohibitions upon smoking in at least some public places,² such as restaurants.³

The police power will not justify a ban on smoking in restaurants if the means employed were not reasonably suited to the achievement of the legislative goal and therefore unconstitutionally burden property interests.⁴ Furthermore, a local board of health of a general health district lacks the authority to adopt a clean indoor air regulation and prohibit smoking in all public places, where the statute permitting the board to make such orders and regulations as are necessary for the public health does not authorize the regulation, and no other express grant of power exists.⁵ Even if a local board of health has statutory authority to regulate smoking in public, the board exceeds the general limitations imposed on rule-making powers by usurping legislative power to make policy-based distinctions when it adopts smoking control rules that distinguish among small and large restaurants, bars, and public places rented for private functions, based on factors other than public health, such as economic hardship and difficulty of enforcement.⁶

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Footnotes

¹ [State v. Heidenhain, 42 La. Ann. 483, 7 So. 621 \(1890\).](#)

As to prohibitions on smoking in the interest of public safety, see § 349.

A municipal ordinance that required tobacco retail establishments, claiming exemption from the Smoke Free Act, to file an annual notice, required such establishments to be licensed, and placed restrictions on indoor smoking was a validly adopted health ordinance, as opposed to a land use ordinance that permitted the continuous operation of a preexisting nonconforming use, where the ordinance was enacted by the municipality's Board of Health in accordance with its statutory authorities to enact health ordinances and other necessary and proper ordinances. *Sparroween, LLC v. Township of West Caldwell*, 452 N.J. Super. 329, 173 A.3d 1097 (App. Div. 2017).

2 *Roark & Hardee LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008); *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522 (S.D. N.Y. 2005); *Operation Badlaw, Inc. v. Licking County General Health Dist. Bd. of Health*, 866 F. Supp. 1059 (S.D. Ohio 1992), judgment aff'd, 991 F.2d 796 (6th Cir. 1993); *Washington v. Tinsley*, 809 F. Supp. 504 (S.D. Tex. 1992).

The Smoke Free Act provision requiring proprietors of public places of employment to prevent smoking on the premises was a valid exercise of the State's police power; the voters who passed the Act by initiative had a legitimate purpose in protecting the general welfare and health of Ohio citizens and the workforce from the dangers of secondhand smoke in enclosed public places, and by requiring that such proprietors take reasonable steps to prevent smoking on their premises by posting "no smoking" signs, removing ashtrays, and requesting patrons to stop smoking, the Act was rationally related to its stated objective. *Wymyslo v. Bartec, Inc.*, 132 Ohio St. 3d 167, 2012-Ohio-2187, 970 N.E.2d 898 (2012).

3 *Beatie v. City of New York*, 123 F.3d 707 (2d Cir. 1997); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 23 P.3d 675, 105 A.L.R.5th 711 (Ct. App. Div. 2 2001); *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001); *Oregon Restaurant Ass'n v. City of Corvallis*, 166 Or. App. 506, 999 P.2d 518 (2000); *Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002); *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008).

4 *Alford v. City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979) (holding that the requirement in the ordinance to designate one of several tables in a room as a nonsmoking area did not limit the amount of smoke in the air).

5 *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536 (2002).

6 *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 478 S.E.2d 528 (1996) (causing disparate treatment of similarly situated patrons, employees, and commercial establishments).

End of Document

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16A Am. Jur. 2d Constitutional Law § 350

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 350. Police power exercised to preserve and protect public morals

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

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[Validity, Construction, and Application of Overt Act Requirement of State Statutes Providing for Commitment of Sexually Dangerous Persons, 56 A.L.R.6th 647](#)
[Regulation of exposure of female, but not male, breasts, 67 A.L.R.5th 431](#)
[Validity of state or local gross receipts tax on gambling, 21 A.L.R.5th 812](#)
[Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses, 10 A.L.R.5th 538](#)
[Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356](#)
[Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling, 80 A.L.R.4th 1079](#)
[Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool, 78 A.L.R.4th 483](#)
[Validity and construction of statutes or ordinances prohibiting profanity or profane swearing or cursing, 5 A.L.R.4th 956](#)
[Validity and construction of statute or ordinance prohibiting use of "obscene" language in public, 2 A.L.R.4th 1331](#)
[Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 A.L.R.3d 297](#)
[Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation—modern cases, 77 A.L.R.3d 519](#)

Validity of statute making adultery and fornication criminal offense, 41 A.L.R.3d 1338

Validity of blasphemy statutes or ordinances, 41 A.L.R.3d 519

Requirement of 18 U.S.C.A. sec. 1955, prohibiting illegal gambling businesses, that such businesses involve five or more persons, 55 A.L.R. Fed. 778

Validity, construction, and application of 18 U.S.C.A. sec. 1955 prohibiting illegal gambling businesses, 21 A.L.R. Fed. 708

Validity and construction of federal statute (18 USC sec. 1084(a)) making transmission of wagering information a criminal offense, 5 A.L.R. Fed. 166

A cardinal principle in the exercise of the police power establishes the well-settled, but often challenged, rule that the police power may be exerted to preserve and protect the public morals.¹ Crafting and safeguarding public morality have long been an established part of the states' plenary police power to legislate² and indisputably are legitimate government interests to be appraised under a standard of rational basis scrutiny.³ The Federal Constitution does not recognize any absolute and uncontrollable liberty, and the society is thus free to enact laws against evils that threaten the morals and welfare of the people.⁴ The state may exercise its police power to promote public morality, and in furthering that objective, it may subject persons and property to restraints and burdens, even those that impair "natural rights."⁵

Any practice or business that experience shows may weaken or corrupt the morals of those who follow it or encourage idleness instead of industriousness may be a legitimate subject for state regulation.⁶ Thus, for instance, the following may be regulated by the states: gambling;⁷ nude dancing;⁸ prostitution;⁹ and lewdness, indecency, and obscenity.¹⁰ The police power may be exercised to protect and preserve public morality because the destruction of morality nullifies the power of government, with the role of government being reduced to merely keeping public order.¹¹

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Footnotes

- 1 Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); Whole Woman's Health v. Smith, 338 F. Supp. 3d 606 (W.D. Tex. 2018); Richeson v. Helal, 158 Cal. App. 4th 268, 70 Cal. Rptr. 3d 18 (2d Dist. 2007), as modified, (Dec. 21, 2007); Brevard County v. Stack, 932 So. 2d 1258 (Fla. 5th DCA 2006); Village of Chatham v. County of Sangamon, 351 Ill. App. 3d 889, 286 Ill. Dec. 566, 814 N.E.2d 216 (4th Dist. 2004), judgment aff'd, 216 Ill. 2d 402, 297 Ill. Dec. 249, 837 N.E.2d 29 (2005); McKibben Const., Inc. v. Longshore, 788 N.E.2d 452 (Ind. Ct. App. 2003); City of Baton Rouge v. State, ex rel. Dept. of Social Services, 970 So. 2d 985 (La. Ct. App. 1st Cir. 2007); Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007), opinion extended on other grounds after remand, 2008 WL 3999843 (Md. Cir. Ct. 2008) and (abrogated on other grounds by, Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)); Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618 (2007), decision aff'd, 362 N.C. 328, 661 S.E.2d 728 (2008). As to whether a restriction or prohibition of obscene matter is a violation of the rights of free speech and press, see § 524.
- 2 Williams v. Pryor, 240 F.3d 944, 94 A.L.R.5th 735 (11th Cir. 2001); PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004).
- 3 Williams v. Pryor, 240 F.3d 944, 94 A.L.R.5th 735 (11th Cir. 2001).
- 4 State ex rel. Spire v. Strawberries, Inc., 239 Neb. 1, 473 N.W.2d 428 (1991) (disapproved of on other grounds by, American Amusements Co. v. Nebraska Dept. of Revenue, 282 Neb. 908, 807 N.W.2d 492 (2011)).
- 5 Price v. State, 622 N.E.2d 954 (Ind. 1993).
- 6 Dwyer v. People, 82 Colo. 574, 261 P. 858 (1927); Eccles v. Stone, 134 Fla. 113, 183 So. 628 (1938); Fernandez v. Alford, 203 La. 111, 13 So. 2d 483 (1943).

- 7 [State v. Two IGT Video Poker Games, Model FA 180, 237 Neb. 145, 465 N.W.2d 453 \(1991\)](#) (disapproved of on other grounds by, [American Amusements Co. v. Nebraska Dept. of Revenue, 282 Neb. 908, 807 N.W.2d 492 \(2011\)](#)) (holding that a statutory prohibition against the possession or use of gambling devices and the forfeiture of the prohibited devices were rationally related to preventing gambling, were valid exercises of the police power, and complied with the Due Process Clause).
- 8 [Hendricks v. Com., 865 S.W.2d 332 \(Ky. 1993\)](#) (holding that a state ordinance which prohibits a person from appearing nude in any public place was not an unreasonable exercise of the police power as applied to a nude dancing establishment, where the patrons of a nude dancing establishment and the entertainers and employees had no expectation of privacy, as anyone from the general public was admitted to the establishment upon payment of an admission fee).
- 9 [Am. Jur. 2d, Prostitution § 4.](#)
- 10 [Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1, 2, 4.](#)
- 11 [Kingsley Intern. Pictures Corp. v. Regents of University of N.Y., 4 N.Y.2d 349, 175 N.Y.S.2d 39, 151 N.E.2d 197 \(1958\)](#), judgment rev'd on other grounds, [360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 \(1959\)](#).

End of Document

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16A Am. Jur. 2d Constitutional Law § 351

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 351. Police power exercised for public peace, good order, and comfort

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Judicial review under sec. 16 of Noise Control Act of 1972 \(42 U.S.C.A. sec. 4915\) of action of Administrator of Environmental Protection Agency, 59 A.L.R. Fed. 705](#)

The police power includes the right of the state to enact laws necessary to secure the peace, good order, dignity, protection, and comfort of the community,¹ the promotion of domestic tranquility, and the comfort and quiet of all persons.² Thus, the enjoyment of many personal rights and freedoms is subject to many kinds of restraints under the police power of the state, which includes reasonable conditions as may be determined by governmental authority to be essential to the public welfare, safety, and good order of the people.³ The police power of a state extends beyond the health, morals, and safety of the community and encompasses the duty to protect the privacy of its citizens, including the authority to protect the peaceful enjoyment of the home and the well-being and tranquility of the community.⁴

Law enforcement and public safety are legitimate and even compelling state purposes.⁵ The legislature has wide latitude in using its police power to prescribe penalties for criminal offenses, but this discretion is limited by the constitutional guarantee

that a person may not be deprived of liberty without due process of law.⁶ A fundamental aspect of the police power is the suppression of violent crime and the vindication of its victims.⁷

Control of noise is within the police power.⁸ Specifically, the government has a substantial interest in protecting citizens from unwelcome noise, especially when it seeks to protect the well-being, tranquility, and privacy of a home or hotel.⁹

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Footnotes

- 1 Allinder v. City of Homewood, 254 Ala. 525, 49 So. 2d 108, 22 A.L.R.2d 763 (1950); City of Miami v. Romer, 58 So. 2d 849 (Fla. 1952); Hanley v. State, 234 Ind. 326, 126 N.E.2d 879 (1955); State v. Edwards, 787 So. 2d 981 (La. 2001) (social order); Joseph Burstyn, Inc. v. Wilson, 303 N.Y. 242, 101 N.E.2d 665 (1951), judgment rev'd on other grounds, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952).
- 2 Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A.L.R.2d 608 (1949) (regulation of sound trucks); Patterson v. State, 742 N.E.2d 4 (Ind. Ct. App. 2000), on reh'g, 744 N.E.2d 945 (Ind. Ct. App. 2001) (comfort); Frieling v. State, 67 S.W.3d 462 (Tex. App. Austin 2002), petition for discretionary review refused, (June 19, 2002) (prostitution).
- 3 Lynch v. Com., 902 S.W.2d 813 (Ky. 1995).
- 4 Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A.L.R.2d 608 (1949); State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (N.D. 2006).
- 5 King v. State, 272 Ga. 788, 535 S.E.2d 492 (2000).
- 6 People v. Grant, 339 Ill. App. 3d 792, 274 Ill. Dec. 304, 791 N.E.2d 100 (1st Dist. 2003) (upholding an unlawful-use-of-weapon statute that allowed conviction without a criminal objective).
- 7 U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).
- 8 City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973).
- 9 Gimmicks, Inc. v. Dettore, 612 A.2d 655 (R.I. 1992).

End of Document

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16A Am. Jur. 2d Constitutional Law § 352

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 352. Police power exercised for public convenience and general prosperity; economic or financial welfare

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Adverse impact upon existing business as factor affecting validity and substantive requisites of issuance, by state or local governmental agencies, of economic development bonds in support of private business enterprise, 39 A.L.R.4th 1096](#)

The police power of the state includes not only laws designed to promote public health and safety but also those designed to promote economic prosperity.¹ Such laws do not offend substantive due process if they are not unreasonable, arbitrary, or capricious and the means selected have a real and substantial nexus with the governmental goal.² The exercise of the police power finds its justification only in the promotion of public health, safety, welfare, and good order to the end that the public convenience and general prosperity may be attained.³ The police power is thus not limited to the protection of the public health, morals, and safety but extends also to economic need and the need to protect the public from economic harm.⁴

The exercise of the power may include legislation to increase the industries of the state, develop its resources, and add to its welfare and prosperity.⁵ An otherwise valid exercise of the police power is not rendered unconstitutional merely because of its

financial impact, even when it results in the entire suppression of business or forces the offending industry out of business.⁶ The police power may be exercised for aesthetic purposes in a situation in which it appears that aesthetics are directly related to the general economy as where it is sought to promote the tourist industry by preservation of natural scenic beauty.⁷

States are accorded wide latitude in the regulation of their local economies under their police power,⁸ and rational distinctions may be made with substantially less than mathematical exactitude.⁹ The police power may be exercised to protect the public from financial loss.¹⁰ However, the legislature may not use the power merely to compel the payment of indebtedness.¹¹ Furthermore, if, in the interest of general welfare, the police power may be exercised to protect citizens and their businesses in financial and economic matters, it may similarly be exercised to protect the government itself against potential financial loss and the possible disruption of governmental functions.¹²

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Footnotes

- 1 [Nashville, C. & St. L. Ry. v. Walters](#), 294 U.S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935); [Brevard County v. Stack](#), 932 So. 2d 1258 (Fla. 5th DCA 2006); [Gross v. Woodman's Food Market, Inc.](#), 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718 (Ct. App. 2002).
- 2 [Gross v. Woodman's Food Market, Inc.](#), 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718 (Ct. App. 2002).
- 3 [440 East 102nd Street Corporation v. Murdock](#), 285 N.Y. 298, 34 N.E.2d 329 (1941).
The term "public convenience," as found in a zoning ordinance enacted under the police power, is not used in a colloquial manner as synonymous with "handy" but refers to what is fitting or suited to the public need. [Milwaukie Co. of Jehovah's Witnesses v. Mullen](#), 214 Or. 281, 330 P.2d 5, 74 A.L.R.2d 347 (1958).
- 4 [Veix v. Sixth Ward Building & Loan Ass'n of Newark](#), 310 U.S. 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); [Zeigler v. People](#), 109 Colo. 252, 124 P.2d 593 (1942); [Steinberg-Baum & Co. v. Countryman](#), 247 Iowa 923, 77 N.W.2d 15 (1956); [Lane Distributors v. Tilton](#), 7 N.J. 349, 81 A.2d 786 (1951).
Social and economic regulations will be upheld against constitutional challenges as long as the regulations have a rational relationship to the legitimate goal of government. [Price v. Heckler](#), 733 F.2d 699 (9th Cir. 1984).
- 5 [Bayside Fish Flour Co. v. Gentry](#), 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936); [Graham v. Kingwell](#), 218 Cal. 658, 24 P.2d 488 (1933); [Hotel Dorset Co. v. Trust for Cultural Resources of City of New York](#), 46 N.Y.2d 358, 413 N.Y.S.2d 357, 385 N.E.2d 1284 (1978); [State ex rel. Cleveringa v. Klein](#), 63 N.D. 514, 249 N.W. 118, 86 A.L.R. 1523 (1933); [Mendiola v. Graham](#), 139 Or. 592, 10 P.2d 911 (1932).
An administrative rule compelling a declaration of Florida origin on the labels of processed grapefruit products constituted a proper exercise of the state's police power, since economic considerations may provide a proper basis for such an exercise. [Coca-Cola Co., Food Division, Polk County v. State, Dept. of Citrus](#), 406 So. 2d 1079 (Fla. 1981).
- 6 [Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Com'n](#), 778 A.2d 785 (Pa. Commw. Ct. 2001) (holding that the entire reconstruction costs of a rail-highway crossing bridge that carried a road over railway tracks could be allocated to the railway).
- 7 [Opinion of the Justices](#), 103 N.H. 268, 169 A.2d 762 (1961).
As to aesthetic considerations, generally, see § 386.
- 8 [Star Scientific Inc. v. Beales](#), 278 F.3d 339 (4th Cir. 2002).
- 9 [Star Scientific Inc. v. Beales](#), 278 F.3d 339 (4th Cir. 2002).
- 10 [Zeigler v. People](#), 109 Colo. 252, 124 P.2d 593 (1942); [State v. Champe](#), 373 So. 2d 874 (Fla. 1978); [People v. Murphy](#), 364 Mich. 363, 110 N.W.2d 805, 89 A.L.R.2d 1006 (1961).
- 11 [Gulf, C. & S.F. Ry. Co. v. Ellis](#), 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897).
- 12 [Sherman-Reynolds, Inc. v. Mahin](#), 47 Ill. 2d 323, 265 N.E.2d 640 (1970) (addressing the validity of withholding provisions of a state income tax statute).

End of Document

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16A Am. Jur. 2d Constitutional Law § 353

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 353. Police power exercised for protection of environment or ecology

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Local use zoning of wetlands or flood plain as taking without compensation, 19 A.L.R.4th 756](#)

[Constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095](#)

[Construction and Application of Prohibited Acts Under Sec. 9\(a\) of the Endangered Species Act of 1973, 16 U.S.C.A. §1538\(a\), 9 A.L.R. Fed. 3d Art. 3](#)

[Construction and Application of the Cooperation with States Requirement under Sec. 6 of the Endangered Species Act of 1973, 16 U.S.C.A. §1535, 8 A.L.R. Fed. 3d Art. 3](#)

[Construction and Application of Threatened Species Requirements under Sec. 4\(a\) and \(b\) of the Endangered Species Act of 1973, 16 U.S.C.A. §1533\(a\) and \(b\), 6 A.L.R. Fed. 3d Art. 2](#)

[Construction and Application of Exceptions Under §10 of the Endangered Species Act of 1973, 16 U.S.C.A. §1539, 2 A.L.R. Fed. 3d Art. 2](#)

[Construction and Application of the Consultation Requirement Under Section 7 of the Endangered Species Act, 16 U.S.C.A. §1536\(a\) to \(d\), 1 A.L.R. Fed. 3d Art. 4](#)

[Construction and Application of Civil Penalties Under §11 of the Endangered Species Act of 1973, 16 U.S.C.A. §1540, Excluding Injunctive Relief or Forfeitures, 87 A.L.R. Fed. 2d 455, Standard of Review Under the Endangered Species Act of 1973, 16 U.S.C.A. §§1531 to 1544, 93 A.L.R. Fed. 2d 121](#)

[Validity, construction, and application of Endangered Species Act of 1973 \(16 U.S.C.A. secs. 1531-1543\), 32 A.L.R. Fed. 332](#)

Validity, construction, and application of federal statute (16 U.S.C.A. sec. 551) and implementing regulations providing for protection of national forests and punishing violations of such regulations, 19 A.L.R. Fed. 492

State or local regulations for the protection of the natural environment or the ecology of an area are within the scope of the police power.¹ Thus, for example, valid exercises of the police power have been recognized for sanitary landfill statutes,² wildlife protection programs,³ and statutes requiring permits for the disposal of solid waste.⁴ Furthermore, inadequate systems of sewage disposal present ecological problems and may also pose direct and immediate health hazards, requiring remedies to be fashioned under the state's police power.⁵ Mineral lease are subject to the state's police power to conserve and develop the state's natural resources.⁶

In the case of an exercise of the police power in a manner designed to protect the natural environment, the test is not whether there is a clear and present danger to the environment that justifies the legislation but whether the legislative body could have determined on any reasonable basis that the legislation is necessary or desirable for its intended purpose.⁷ However, a state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition, and a state cannot evade this principle by cloaking objectionable legislation under the more palatable rubric of environmental protection.⁸

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Footnotes

- 1 [Huron Portland Cement Co. v. City of Detroit, Mich.](#), 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852, 78 A.L.R.2d 1294 (1960); [People v. K. Sakai Co.](#), 56 Cal. App. 3d 531, 128 Cal. Rptr. 536 (1st Dist. 1976).
Traditional and primary power over land and water use belong to the states. [Georgia v. Pruitt](#), 326 F. Supp. 3d 1356 (S.D. Ga. 2018).
An order by the Land and Water Adjudicatory Commission which denied a permit for development of swamp-land was a valid exercise of police power promoting the general welfare where the order was based on findings that the proposed development would cause pollution in surrounding bays and would adversely affect the economy. [Graham v. Estuary Properties, Inc.](#), 399 So. 2d 1374 (Fla. 1981).
- 2 [Ex parte Lauderdale County](#), 565 So. 2d 623 (Ala. 1990) (a sanitary landfill operator brought an action challenging the constitutionality of a statute which authorized local governing bodies to approve or disapprove disposal sites, but the state supreme court held that great latitude should be allowed to the legislature in determining the character of laws intended to protect the public health, and how, when, and by whom, in their practical administration, they should be applied).
- 3 [State v. Walsh](#), 123 Wash. 2d 741, 870 P.2d 974 (1994).
- 4 [Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources](#), 266 Ga. 253, 466 S.E.2d 197 (1996).
- 5 [Charles v. Diamond](#), 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977).
- 6 [Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.](#), 554 S.W.3d 586 (Tex. 2018).
- 7 [People v. K. Sakai Co.](#), 56 Cal. App. 3d 531, 128 Cal. Rptr. 536 (1st Dist. 1976) (holding that penal statutes proscribing the importation and sale of products of certain endangered species of animals and amphibians, including whales, are not an unreasonable exercise of the police power as applied to prohibit the sale of such products imported prior to the effective date of the legislation).
- 8 [Douglas v. Seacoast Products, Inc.](#), 431 U.S. 265, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977) (holding that Virginia laws limiting fishing by nonresidents in Virginia waters and limiting the issuance of fishing licenses to United States citizens were an attempted exercise of the state's police power in conflict with the federal laws and Constitution and were therefore invalid).

End of Document

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16A Am. Jur. 2d Constitutional Law § 354

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

2. Purposes for Which Police Powers May Be Exercised

§ 354. Police power exercised for fraud prevention

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power of the state extends beyond regulations necessary for the preservation of good order or the public health and safety to encompass the prevention of fraud and deceit.¹ Thus, a state may use its police power to prevent cheating and imposition² and unfair dealing.³ The power to prevent fraud may be exercised to protect not only the intelligent and prudent but also the ignorant and rash.⁴ A state may prescribe any regulation that it determines will tend to secure the people against the consequences of fraud.⁵ The state may institute any reasonable preventive remedy required by the frequency of fraud or the difficulty experienced by individuals in circumventing it, especially when other means have not proved effective.⁶

A state statute designed to prevent the consumers of particular goods from being deceived is a valid exercise of the state police power even when the law cannot be classified as a health measure, as neither logic nor precedent suggests any distinction between state regulations assigned to keep unhealthy or unsafe commodities off retailers' shelves and those designed to prevent consumer deception.⁷ In many instances the regulation of a business by the state is proper solely because the nature of the business will encourage fraud by those engaged in it or because fraudulent schemes or dealings are either appurtenant to its operation or so closely allied with it that the public must be protected from its dangers.⁸

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Footnotes

- 1 Fontenot v. Hunter, 378 F. Supp. 3d 1075 (W.D. Okla. 2019), appeal dismissed, (10thCir 19-6077) (May
24, 2019) and appeal dismissed, (10thCir 19-6078) (May 28, 2019); Department of Financial Institutions
v. General Finance Corp., 227 Ind. 373, 86 N.E.2d 444, 10 A.L.R.2d 436 (1949); Carolene Products Co. v.
Mohler, 152 Kan. 2, 102 P.2d 1044 (1940); City of Kansas City v. Jordan, 174 S.W.3d 25 (Mo. Ct. App. W.D.
2005); National City Bank of New York v. Del Sordo, 16 N.J. 530, 109 A.2d 631 (1954); Cosmopolitan Life
Ins. Co. v. Northington, 201 Tenn. 541, 300 S.W.2d 911 (1957).
- 2 The state has broad police powers to prohibit fraud. Buffo v. Graddick, 742 F.2d 592 (11th Cir. 1984).
- 3 Hirsch v. City and County of San Francisco, 143 Cal. App. 2d 313, 300 P.2d 177 (1st Dist. 1956).
- 4 Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420, 55 A.L.R.2d 467 (1955).
- State v. Hudson House, Inc., 231 Or. 164, 371 P.2d 675 (1962).
- The power of the state to provide for the general welfare authorizes it to establish such regulations as will
secure or tend to secure the people against ignorance often due from an incomplete disclosure of the facts
by one in a unique position to know the facts. U. S. ex rel. Shott v. Tehan, 365 F.2d 191, 9 Ohio Misc. 135,
37 Ohio Op. 2d 341, 38 Ohio Op. 2d 244 (6th Cir. 1966).
- 5 State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336 (1935); City of Shreveport v. Cunningham, 190
La. 481, 182 So. 649 (1938); People v. Perretta, 253 N.Y. 305, 171 N.E. 72, 84 A.L.R. 636 (1930).
- 6 Zeigler v. People, 109 Colo. 252, 124 P.2d 593 (1942); Cosmopolitan Life Ins. Co. v. Northington, 201 Tenn.
541, 300 S.W.2d 911 (1957).
- 7 Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963).
- 8 State v. Memorial Gardens Development Corp., 143 W. Va. 182, 101 S.E.2d 425, 68 A.L.R.2d 1233 (1957).

End of Document

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16A Am. Jur. 2d Constitutional Law § 355

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

a. Occupations and Businesses Subject to Control

§ 355. Regulation of businesses pursuant to police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The state, pursuant to its inherent police powers, may regulate businesses to protect the public health, safety, or welfare.¹ Furthermore, the state may exercise its police power only if there is such a threat.² Whenever a state determines, in good faith, that a practice of an industry harms the public, the state may control the practice even if the legislation directly affects the internal affairs of a business or industry so long as the legislation is neither arbitrary nor discriminatory.³

Laws may also exact costs from private businesses, including the costs of regulation,⁴ as a reasonable use of the police power.⁵

The regulation of a business that could threaten the welfare of others if left unregulated does not deprive its owner of property or liberty without due process of law.⁶ If a business itself is a proper subject of police regulation, then so are all its incidents and accessories,⁷ such as the manner of conducting the business.⁸ States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law.⁹ Under this constitutional doctrine, the Due Process Clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.¹⁰

Footnotes

- 1 [Custard Ins. Adjusters, Inc. v. Youngblood](#), 686 So. 2d 211 (Ala. 1996) (insurance companies); [Leavell v. Department of Natural Resources](#), 397 Ill. App. 3d 937, 337 Ill. Dec. 978, 923 N.E.2d 829 (5th Dist. 2010). While the state has power to regulate the insurance business, its power to regulate cannot be permitted to "obscure the Bill of Rights"; the legislative authority may not, under the guise of promoting the public interest, arbitrarily interfere, since the police power is not without limitations. [Minor v. Stephens](#), 898 S.W.2d 71 (Ky. 1995).
The legislature may in the exercise of its police power regulate businesses in order to promote the public welfare; the party challenging the validity of the statute has the burden of proving it is unconstitutional. [State ex rel. Faulk v. CSG Job Center](#), 117 Wash. 2d 493, 816 P.2d 725 (1991) (abrogated on other grounds by, [Yim v. City of Seattle](#), 194 Wash. 2d 682, 451 P.3d 694 (2019)).
The power of the legislature to regulate a nonessential and inherently dangerous activity like gaming is almost without limit as its authority stems from a wholly constitutional expression of concern for public health, safety, morals, or general welfare; [In re Adamar of New Jersey, Inc.](#), 401 N.J. Super. 247, 950 A.2d 231 (App. Div. 2008), judgment aff'd, 197 N.J. 179, 962 A.2d 482 (2008).
- 2 [Priddy v. City of Tulsa](#), 1994 OK CR 63, 882 P.2d 81 (Okla. Crim. App. 1994) (holding that ordinances requiring sign painters to obtain licenses and to obtain a permit for each sign erected had no logical connection to the purpose of protecting the safety of citizens and were unconstitutional as exceeding the extent of the police power).
- 3 [20th Century Ins. Co. v. Superior Court](#), 90 Cal. App. 4th 1247, 109 Cal. Rptr. 2d 611 (2d Dist. 2001) (upholding a statute that revived for one-year insurance claims arising out of a particular earthquake if the claim was barred by the statute of limitations and was not litigated to finality).
- 4 [Maine Beer & Wine Wholesalers Ass'n v. State](#), 619 A.2d 94 (Me. 1993).
- 5 [Tri-State Rubbish, Inc. v. Town of New Gloucester](#), 634 A.2d 1284 (Me. 1993).
- 6 [Paterson v. University of State of N.Y.](#), 14 N.Y.2d 432, 252 N.Y.S.2d 452, 201 N.E.2d 27 (1964).
- 7 [People v. Victor](#), 287 Mich. 506, 283 N.W. 666, 124 A.L.R. 316 (1939).
- 8 [Antonello v. City of San Diego](#), 16 Cal. App. 3d 161, 93 Cal. Rptr. 820 (4th Dist. 1971).
- 9 [North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.](#), 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973); [Ferguson v. Skrupa](#), 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963).
- 10 [Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.](#), 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

End of Document

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16A Am. Jur. 2d Constitutional Law § 356

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

a. Occupations and Businesses Subject to Control

§ 356. Regulation of occupations pursuant to police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A state may lawfully exercise its police power to protect the public health, safety, welfare, and morals by promulgating laws and regulations that reasonably regulate occupations.¹ However, an overbroad statute violates substantive due process by depriving a person of a constitutionally protected interest through means which are not rationally related to a valid state objective because it sweeps unnecessarily broadly.² The right of an individual to engage in any of the common occupations of life is among the several fundamental liberties protected by the Due Process and Equal Protection Clauses of the 14th Amendment.³ However, neither the federal nor any state constitution secures to any person the liberty to conduct a business so as to injure the public at large or any substantial group.⁴ A statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to the individual's fitness or competence to practice that profession.⁵ Before the police power of the state is used to prohibit the conduct of an individual as unprofessional, offending actions that do not fall clearly within the scope of the proscription must be explicitly defined as wrongful.⁶

An individual who has obtained the license required to engage in a particular profession or vocation has a fundamental vested right to continue in that activity.⁷ However, this general right to engage in a trade, profession, or business is subject to the power inherent in the state to make necessary rules and regulations governing the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order, and safety.⁸ A regulation of this type does not deprive owners of property without due process of law.⁹ No person can acquire a vested right to continue, when once licensed, in a business, trade,

or occupation that is subject to legislative control under the police powers.¹⁰ Although a license, as a species of property, may require the government to afford an appropriate process before imposing restrictions, the people, either directly or through their legislature, may alter the substantive terms of a promise not to interfere in private economic transactions.¹¹

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Footnotes

- 1 [Bennett v. Bureau of Professional and Occupational Affairs](#), 214 A.3d 728 (Pa. Commw. Ct. 2019).
- 2 [Diwara v. State Board of Cosmetology](#), 852 A.2d 1279 (Pa. Commw. Ct. 2004).
- 3 [Hughes v. Board of Architectural Examiners](#), 17 Cal. 4th 763, 72 Cal. Rptr. 2d 624, 952 P.2d 641 (1998).
As to constitutional rights respecting the right to engage in a business or occupation, generally, see § 638.
- 4 § 639.
- 5 [Hughes v. Board of Architectural Examiners](#), 17 Cal. 4th 763, 72 Cal. Rptr. 2d 624, 952 P.2d 641 (1998).
- 6 [State v. C.M.B. III Enterprises, Inc.](#), 734 N.E.2d 653 (Ind. Ct. App. 2000) (involving disciplinary sanctions on a real estate corporation and real estate brokers).
- 7 [Hughes v. Board of Architectural Examiners](#), 17 Cal. 4th 763, 72 Cal. Rptr. 2d 624, 952 P.2d 641 (1998).
- 8 [Hughes v. Board of Architectural Examiners](#), 17 Cal. 4th 763, 72 Cal. Rptr. 2d 624, 952 P.2d 641 (1998).
- 9 [Hughes v. Board of Architectural Examiners](#), 17 Cal. 4th 763, 72 Cal. Rptr. 2d 624, 952 P.2d 641 (1998).
An alleged midwife, in an action to enjoin the alleged midwife from the unlicensed practice of nursing or midwifery following a "water delivery" which resulted in the death of a newborn, was not denied her liberty and property interest in her employment as a traditional midwife; the regulation of the nursing practice contained within the Nursing and Advanced Practice Nursing Act is designed to protect the health and safety of the public. [People ex rel. Sherman v. Cryns](#), 203 Ill. 2d 264, 271 Ill. Dec. 881, 786 N.E.2d 139 (2003).
- 10 [Hughes v. Board of Architectural Examiners](#), 17 Cal. 4th 763, 72 Cal. Rptr. 2d 624, 952 P.2d 641 (1998).
- 11 [National Paint & Coatings Ass'n v. City of Chicago](#), 45 F.3d 1124 (7th Cir. 1995) (holding that the right to buy spray paint is not a "fundamental right" such that a statute prohibiting the sale of spray paint within the city could be considered a violation of store owners' substantive due process interests).

End of Document

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16A Am. Jur. 2d Constitutional Law § 357

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

a. Occupations and Businesses Subject to Control

§ 357. Regulation of lawful pursuits pursuant to police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

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[Validity and construction of statute or ordinances forbidding treatment in health clubs or massage salons by persons of the opposite sex, 51 A.L.R.3d 936](#)

A calling is not exempt from police power regulation merely because it is lawful as the power to regulate occupations and businesses is not confined to the regulation of business that are essentially illegal.¹ Thus, the right of reasonable regulation is a restriction on the broad generalization that every person has a right to pursue any lawful calling.² An occupation that is not harmful per se may nonetheless be regulated under the police power if it may endanger the health, morals, safety, or general welfare of the public if practiced by persons who lack adequate training, education or experience, or by those not morally qualified or of sufficient age or discretion.³ Thus, a state may regulate an honest business if it is or may become an instrument of widespread oppression⁴ or fraud.⁵ Moreover, a business may be regulated even if it is not a nuisance per se.⁶

The state may regulate a business that may become unlawful by the use of improper and unlawful means,⁷ since the authority to exercise the police power is a continuing one, and a business that is lawful today may become a menace to the public health and welfare due to a changed situation, the growth of population, or other causes.⁸ However, statutes limiting and regulating occupations which, prior to their enactment, were of common right are unwarranted unless they relate to the public and are enacted for its benefit.⁹ Unless an act restricting the ordinary occupations of life bears some reasonable relation to a valid object of the police power, it is repugnant to constitutional guaranties and, thus, void.¹⁰ Limitations on the right to work may be sustained only after the most careful scrutiny.¹¹ If a lawful business is beneficial and not directly or indirectly dangerous to the public, it cannot ordinarily be subjected to any police power regulation whatever.¹²

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Footnotes

- 1 [Custard Ins. Adjusters, Inc. v. Youngblood](#), 686 So. 2d 211 (Ala. 1996); [McKay Jewelers v. Bowron](#), 19 Cal. 2d 595, 122 P.2d 543, 139 A.L.R. 1188 (1942); [Ex parte McCloskey](#), 82 Tex. Crim. 531, 199 S.W. 1101 (1917), [aff'd](#), 252 U.S. 107, 40 S. Ct. 306, 64 L. Ed. 481 (1920); [Reaves Warehouse Corp. v. Commonwealth](#), 141 Va. 194, 126 S.E. 87 (1925).
- 2 [Weill v. State ex rel. Gaillard](#), 250 Ala. 328, 34 So. 2d 132 (1948).
The state, in the proper exercise of its general police powers, may regulate an economic right, such as the right to pursue a profession, where the public health, safety, or general welfare so requires. [LMP Services, Inc. v. City of Chicago](#), 2017 IL App (1st) 163390, 420 Ill. Dec. 163, 95 N.E.3d 1259 (App. Ct. 1st Dist. 2017), [appeal allowed](#), 420 Ill. Dec. 731, 98 N.E.3d 35 (Ill. 2018) and [judgment aff'd](#), 2019 IL 123123, 2019 WL 2218923 (Ill. 2019), [cert. denied](#), 140 S. Ct. 468, 205 L. Ed. 2d 273 (2019).
The right to engage in business is subject to the state's police powers to enact laws in furtherance of the public health, safety, welfare, and morals. [Murphy-DuBay v. Department of Licensing & Regulatory Affairs](#), 311 Mich. App. 539, 876 N.W.2d 598 (2015).
The right to engage in a legitimate employment or business receives recognition as a portion of the individual freedoms secured by the due process provision of the Federal and State Constitutions, but this does not close the door to all legislative control over the exercise of the right. [Hope v. Contractors' State License Bd.](#), 228 Cal. App. 2d 414, 39 Cal. Rptr. 514 (3d Dist. 1964).
- 3 [Eye Dog Foundation v. State Bd. of Guide Dogs for Blind](#), 67 Cal. 2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 (1967).
- 4 [People ex rel. Durham Realty Corporation v. La Fetra](#), 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152 (1921); [State v. Levitan](#), 190 Wis. 646, 210 N.W. 111, 48 A.L.R. 434 (1926).
- 5 [People v. Beakes Dairy Co.](#), 222 N.Y. 416, 119 N.E. 115, 3 A.L.R. 1260 (1918).
- 6 [State v. Kievman](#), 116 Conn. 458, 165 A. 601, 88 A.L.R. 962 (1933).
- 7 [State v. Rossman](#), 93 Wash. 530, 161 P. 349 (1916).
- 8 [Taylor v. Trianon Amusement Co.](#), 146 Fla. 447, 200 So. 912 (1941); [Kalbfell v. City of St. Louis](#), 357 Mo. 986, 211 S.W.2d 911 (1948).
- 9 [Noble v. Davis](#), 204 Ark. 156, 161 S.W.2d 189 (1942).
- 10 [Perrine v. Municipal Court](#), 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971); [Metropolitan Trust Co. v. Jones](#), 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943); [Sperry & Hutchinson Co. v. McBride](#), 307 Mass. 408, 30 N.E.2d 269, 131 A.L.R. 1254 (1940); [Lakewood Exp. Service v. Board of Public Utility Com'rs](#), 1 N.J. 45, 61 A.2d 730, 7 A.L.R.2d 1259 (1948).
As to the standard of review of economic legislation under the constitutional guaranty of equal protection of the laws, see § 849.
- 11 [Sail'er Inn, Inc. v. Kirby](#), 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351 (1971).
- 12 [Priddy v. City of Tulsa](#), 1994 OK CR 63, 882 P.2d 81 (Okla. Crim. App. 1994).

The police power cannot extend beyond the necessities of a case and be made a cloak to destroy constitutional rights as to the inviolateness of private property. [Scrutton v. Sacramento County](#), 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (3d Dist. 1969).

End of Document

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16A Am. Jur. 2d Constitutional Law § 358

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

a. Occupations and Businesses Subject to Control

§ 358. Regulation of lawful pursuits pursuant to police power—Professions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar—Conduct Unrelated to Admission to Bar, 8 A.L.R.6th 1](#)

[Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar, 3 A.L.R.6th 49](#)

[Ophthalmological malpractice, 30 A.L.R.5th 571](#)

[Podiatry or chiropody statutes: validity, construction, and application, 45 A.L.R.4th 888](#)

[Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect, 44 A.L.R.4th 649](#)

[Validity and application of statute prohibiting use of name descriptive of engineering by business organization not practicing profession of engineering, 13 A.L.R.4th 676](#)

[Validity, construction, and effect of statutes or regulations governing practice of veterinary medicine, 8 A.L.R.4th 223](#)

Forms

Forms relating to judicial supervision of legal profession; admission to practice—state bar, generally, see Am. Jur. Pleading and Practice Forms, Attorneys-at-Law [\[Westlaw®\(r\) Search Query\]](#)

The legislature may impose restrictions on the practice of a profession that the protection of the public may require.¹ The states have a compelling interest in the practice of professions within their boundaries.² As part of their power to protect the public health, safety, and other valid interests, the states have broad power to establish standards for licensing practitioners and regulating the practice of professions.³ Thus, the legislature has the power, for the protection of the public, to regulate the practice of any profession that requires the possession of special knowledge, skill, and training,⁴ such as professions concerned with health,⁵ law,⁶ engineering,⁷ accounting,⁸ architecture,⁹ and teaching.¹⁰

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Footnotes

- 1 [Barsky v. Board of Regents of University](#), 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954); [Weill v. State ex rel. Gaillard](#), 250 Ala. 328, 34 So. 2d 132 (1948); [Rosenblatt v. California State Bd. of Pharmacy](#), Dept. of Professional and Vocational Standards, 69 Cal. App. 2d 69, 158 P.2d 199 (3d Dist. 1945); [State Bd. of Medical Examiners v. Beatty](#), 220 La. 1, 55 So. 2d 761 (1951); [Kelly v. State](#), 139 Tex. Crim. 156, 138 S.W.2d 1075 (1940).
- 2 [Goldfarb v. Virginia State Bar](#), 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975).
- 3 [Goldfarb v. Virginia State Bar](#), 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975).
- 4 [Paterson v. University of State of N.Y.](#), 14 N.Y.2d 432, 252 N.Y.S.2d 452, 201 N.E.2d 27 (1964).
As to the mode of regulation, see §§ 362 to 367.
- 5 [Desnick v. Department of Professional Regulation](#), 171 Ill. 2d 510, 216 Ill. Dec. 789, 665 N.E.2d 1346 (1996) (holding that it is a proper exercise of the state's police power to legislate and protect the professions performing health-related services against commercialization and exploitation, and such goals will potentially constitute the substantial interest justifying a restriction on commercial speech under the First Amendment).
- 6 [Am. Jur. 2d, Attorneys at Law § 2.](#)
- 7 [Snell v. Engineered Systems & Designs, Inc.](#), 669 A.2d 13 (Del. 1995) (holding that, pursuant to the state's police power, the General Assembly may regulate the practice of engineering and the engineering profession within Delaware).
- 8 [Am. Jur. 2d, Accountants §§ 2 to 4.](#)
- 9 [Am. Jur. 2d, Architects §§ 3 to 6.](#)
- 10 [Am. Jur. 2d, Schools §§ 147 to 154.](#)

End of Document

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16A Am. Jur. 2d Constitutional Law § 359

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

a. Occupations and Businesses Subject to Control

§ 359. Regulation of businesses affected with public interest pursuant to police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Validity, Construction, and Application of State Statutory Provisions Prohibiting Sale of Gasoline Below Cost, 26 A.L.R.6th 249](#)

Trial Strategy

[Proof of Statutory Unfair Business Practices under State Law, 177 Am. Jur. Proof of Facts 3d 303](#)

Although it is difficult to define and classify exactly what is meant or included in the phrase "business affected with a public interest,"¹ there is a general principle that individuals or corporations engaged in occupations in which the public has an interest

or use may be regulated under the police power.² In general, the legislature may make reasonable regulations to protect the public in relations with businesses affected with a public interest.³ A business may be so largely affected with a public interest as to permit legislative regulation, even though no public trust is imposed upon the property and despite the fact that the public may not have a legal right to demand and receive service.⁴ The concept of business "affected with a public interest" is thus not confined to industries in the nature of public utilities.⁵

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Footnotes

- 1 § 360.
- 2 *Custard Ins. Adjusters, Inc. v. Youngblood*, 686 So. 2d 211 (Ala. 1996) (holding that the statute imposing liability upon adjusters who investigate or adjust a claim for unauthorized insurers did not violate due process or equal protection based on an alleged disparity in treatment between agents and adjusters); *Holcomb v. Johnston*, 213 Ga. 249, 98 S.E.2d 561 (1957); *Steinberg-Baum & Co. v. Countryman*, 247 Iowa 923, 77 N.W.2d 15 (1956); *Dean v. City of Winona*, 843 N.W.2d 249 (Minn. Ct. App. 2014); *Hertz Drivurself Stations v. Siggins*, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).
The subject matter of a statute which prohibits the selling of motor fuel below cost falls within the legislature's police powers to regulate an industry of general public interest. *Ports Petroleum Co., Inc. of Ohio v. Tucker*, 323 Ark. 680, 916 S.W.2d 749 (1996).
The licensing and regulation of public service occupations are within the police power of the government. *Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 475 N.W.2d 156 (1991).
- 3 *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018), *aff'd*, 2020 WL 1443533 (8th Cir. 2020) (electrical industry); *Sperry & Hutchinson Co. v. McBride*, 307 Mass. 408, 30 N.E.2d 269, 131 A.L.R. 1254 (1940); *State v. Spears*, 1953-NMSC-033, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595 (1953); *Hertz Drivurself Stations v. Siggins*, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).
- 4 *Hagerman v. City of St. Louis*, 365 Mo. 403, 283 S.W.2d 623, 53 A.L.R.2d 1423 (1955).
- 5 *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 254 P.2d 29 (1953).
As to the meaning of "affected with a public interest," see § 360.

End of Document

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16A Am. Jur. 2d Constitutional Law § 360

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Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

a. Occupations and Businesses Subject to Control

§ 360. Regulation of businesses affected with a public interest pursuant to police power—Meaning of "affected with a public interest"

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The meaning and extent of the phrase "affected with a public interest" have never been completely defined or consistently explained, and indeed the phrase is incapable of exact definition.¹ The expression "clothed with a public interest" means more than that the public welfare is affected by its continuity or by the price at which a commodity is sold or a service rendered.² The relationship between the public and business operators must be so close that it raises an inference that the business has an affirmative obligation to deal with public in a reasonable manner.³ The phrase "affected with a public interest" means only that an industry, for adequate reason, is subject to control for the public good.⁴

Any business is clothed or affected with a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public.⁵ The phrase "affected with a public interest" means that the occupation or industry, when in operation, affects the health, safety, and welfare of the people and that the public is interested to such an extent that reasonable laws can be or may be enacted for its control and regulation.⁶ Indeed, the phrase, when used to describe a business, is the equivalent of "subject to the exercise of the police power."⁷

The standard for determining which businesses are "affected with a public interest" is not specific, and the phrase forms an unsatisfactory test of the constitutionality of legislation directed at business practices or prices.⁸ A business is not affected with

a public interest merely because it is large or because the public is warranted in having a feeling of concern with respect to its maintenance.⁹

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Footnotes

- 1 [Ribnik v. McBride](#), 277 U.S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A.L.R. 1327 (1928) (overruled in part on other grounds by, [Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n](#), 313 U.S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A.L.R. 1500 (1941)).
- 2 [Charles Wolff Packing Co. v. Court of Industrial Relations of State of Kansas](#), 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A.L.R. 1280 (1923).
- 3 [Charles Wolff Packing Co. v. Court of Industrial Relations of State of Kansas](#), 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A.L.R. 1280 (1923).
- 4 [Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); [State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners](#), 40 Cal. 2d 436, 254 P.2d 29 (1953); [Lane Distributors v. Tilton](#), 7 N.J. 349, 81 A.2d 786 (1951).
- 5 [City of Mobile v. Rouse](#), 233 Ala. 622, 173 So. 266, 111 A.L.R. 349 (1937); [Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd.](#), 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).
- 6 [McRae v. Robbins](#), 151 Fla. 109, 9 So. 2d 284 (1942).
A South Carolina statute forbidding the firing of insurance agents primarily because they write large volumes of automobile insurance or because a large portion of the automobile insurance which they write must be ceded to a reinsure facility is a reasonable exercise of the state's police power in that it is related to the statutory goal of ensuring that a qualified applicant would be able to obtain auto insurance from the insurer of his or her choice, and thus, such a statute was constitutional as applied. [Dixon v. Nationwide Mut. Ins. Co.](#), 784 F.2d 1176 (4th Cir. 1986).
- 7 [Stracquadanio v. Department of Health of City of New York](#), 285 N.Y. 93, 32 N.E.2d 806 (1941).
- 8 [Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
- 9 [Williams v. Standard Oil Co. of Louisiana](#), 278 U.S. 235, 49 S. Ct. 115, 73 L. Ed. 287 (1929) (overruled in part on other grounds by, [Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n](#), 313 U.S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A.L.R. 1500 (1941)); [Lane Distributors v. Tilton](#), 7 N.J. 349, 81 A.2d 786 (1951); [Hertz Drivursel Stations v. Siggins](#), 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).

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16A Am. Jur. 2d Constitutional Law § 361

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

a. Occupations and Businesses Subject to Control

§ 361. Regulation of businesses affected with public interest pursuant to police power—Legislative and judicial roles in determining scope

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The determination of what businesses are affected with a public interest is primarily for the legislature.¹ It must be considered, however, that in spite of the fact that the legislature is entitled to great deference,² a mere declaration by it that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.³ The matter is one that is always open to judicial inquiry,⁴ since private businesses cannot be regulated or converted into public businesses by mere legislative fiat.⁵

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Footnotes

- ¹ [Gillett v. Florida University of Dermatology](#), 144 Fla. 236, 197 So. 852 (1940); [State v. Spears](#), 1953-NMSC-033, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595 (1953).
- ² [Block v. Hirsh](#), 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A.L.R. 165 (1921); [Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd.](#), 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).
- ³ [Charles Wolff Packing Co. v. Court of Industrial Relations of State of Kansas](#), 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A.L.R. 1280 (1923); [Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd.](#), 134 Fla. 1, 183 So. 759, 119 A.L.R. 956 (1938).

- 4 Sullivan v. DeCerb, 156 Fla. 496, 23 So. 2d 571 (1945); State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).
- 5 Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

End of Document

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16A Am. Jur. 2d Constitutional Law § 362

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

b. Mode of Regulation

§ 362. Mode of regulation of business and occupations pursuant to police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The fact that the legislature has invoked its police power to regulate a particular trade does not necessarily mean that the power was lawfully exercised,¹ as the means of regulation adopted under the statute must have a definite and reasonable relationship to the goal of protecting the public health, safety, and welfare.² The reasonableness, and hence the validity, of a regulation of a business depends on the facts. A regulation that is valid for one sort of business or under certain circumstances may be invalid for another business or for the same business under other circumstances.³ Different callings may be regulated in different ways because of the manner in which they affect the public.⁴ Thus, a business of a character which places it within the category of "social and economic evils," such as gambling or selling alcoholic beverages or tobacco, may fall within the broad legislative power to prohibit, restrict, or suppress such businesses, while other pursuits, such as agriculture, merchandising, and manufacturing, cannot be so harshly dealt with by the legislature.⁵

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Footnotes

- 1 [Johnson v. Illinois Dept. of Professional Regulation, 308 Ill. App. 3d 508, 241 Ill. Dec. 899, 720 N.E.2d 354 \(4th Dist. 1999\).](#)
- 2 [Church v. State, 164 Ill. 2d 153, 207 Ill. Dec. 6, 646 N.E.2d 572 \(1995\).](#)

- 3 *Nebbia v. People of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); *In re Porterfield*, 28 Cal. 2d 91, 168 P.2d 706, 167 A.L.R. 675 (1946); *City of St. Paul v. Dalsin*, 245 Minn. 325, 71 N.W.2d 855 (1955).
- 4 *State v. Reeve*, 104 Fla. 196, 139 So. 817, 79 A.L.R. 1119 (1932).
- 5 *Northwestern Nat. Ins. Co. v. Fishback*, 130 Wash. 490, 228 P. 516, 36 A.L.R. 1507 (1924).
The degree of regulation must be commensurate with the evils to be remedied. *Ex parte Fuller*, 15 Cal. 2d 425, 102 P.2d 321 (1940).

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American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

b. Mode of Regulation

§ 363. Prohibition of business or occupation pursuant to police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

Although there is authority that the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it,¹ generally whenever it is necessary for the preservation of the public health, safety, morals, or peace, or for the promotion of the general welfare of the community, the legislature may completely prohibit the carrying on of any particular business, calling, trade, or enterprise.² Thus, to protect the public, the legislature may absolutely forbid the manufacture of an article despite its usefulness for some purposes.³ Furthermore, a legislature may prohibit the conduct of certain occupations in particular localities because of noise, odors, or other features that menace the health, safety, or welfare of the community.⁴

The legislature may not preclude lawful businesses unless they are injurious to others⁵ or tend to cause harm.⁶ If a business in itself is harmless and legitimate, the power of the state to regulate it is not the equivalent of the power to suppress or destroy.⁷ Nondangerous businesses cannot be legislated out of existence.⁸ A legislative prohibition of particular occupations is a proper method of ending abuses only if the harms are general and difficult to control by regulation, and when they cause or threaten an injury to the public so serious that the legislature might reasonably find it outweighs the harm that would be caused to some by complete prohibition.⁹ The right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, as by imposing onerous, unusual, or unnecessary restrictions or requirements,¹⁰ although such an occupation may be subjected to regulation in the public interest even if the regulation limits the exercise of the right.¹¹

A prohibition of a particular business is inoperative and void if it is not a reasonable exercise of the police power for promoting the general welfare but instead has the effect of granting to one class of citizens a privilege not equally available to all.¹² The legislature may not prohibit a business if all the reasons assigned for the exercise of the power are merely fanciful.¹³

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Footnotes

- 1 [State v. Harris](#), 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).
A distinction exists between the power of the state to regulate a business and the power to prohibit it. [State v. Memorial Gardens Development Corp.](#), 143 W. Va. 182, 101 S.E.2d 425, 68 A.L.R.2d 1233 (1957).
- 2 [Great Atlantic & Pacific Tea Co. v. Grosjean](#), 301 U.S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, 112 A.L.R. 293 (1937); [Hagerman v. City of St. Louis](#), 365 Mo. 403, 283 S.W.2d 623, 53 A.L.R.2d 1423 (1955); [Benjamin v. City of Columbus](#), 167 Ohio St. 103, 4 Ohio Op. 2d 113, 146 N.E.2d 854 (1957).
A county zoning ordinance requiring adult entertainment businesses to locate only in industrial zones had the purpose and effect of suppressing secondary effects while leaving the quantity and accessibility of speech substantially intact, as required to justify a content-based zoning restriction of sexual and pornographic speech, where the county cited to numerous sources to connect adult businesses to secondary effects of crime, disorderly conduct, property depreciation, noise, and traffic; adult businesses failed to cast doubt on the reduction of noise and traffic by relocation to industrial sites; and the patrons would be undeterred by the inconvenience of traveling to an industrial zone if there were sufficient number of suitable relocation sites available, given the draw of pornographic and sexually explicit speech. [Tollis, Inc. v. County of San Diego](#), 505 F.3d 935 (9th Cir. 2007).
A state statute making it a misdemeanor for any person to engage in the business of "debt adjusting" except as an incident to the lawful practice of law violates neither the Due Process nor the Equal Protection Clause of the United States Constitution. [Ferguson v. Skrupa](#), 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963).
- 3 [Ex parte Hixson](#), 61 Cal. App. 200, 214 P. 677 (2d Dist. 1923) (although an article may be useful for some purposes, its harmfulness to the public from its general use may be so great and widespread and its secret disposition may be so difficult to prevent that the legislature may absolutely forbid its manufacture or sale or both so as to root out its evil effects).
- 4 [Hadacheck v. Sebastian](#), 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); [Ex parte Montgomery](#), 163 Cal. 457, 125 P. 1070 (1912) (lumberyard); [Boyd v. City of Sierra Madre](#), 41 Cal. App. 520, 183 P. 230 (2d Dist. 1919) (corrals).
- 5 [State v. Kartus](#), 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336 (1935); [Cap F. Bourland Ice Co. v. Franklin Utilities Co.](#), 180 Ark. 770, 22 S.W.2d 993, 68 A.L.R. 1018 (1929); [State v. Gateway Mortuaries](#), 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512 (1930).
- 6 [Berry v. Summers](#), 76 Idaho 446, 283 P.2d 1093 (1955); [Hagerman v. City of St. Louis](#), 365 Mo. 403, 283 S.W.2d 623, 53 A.L.R.2d 1423 (1955); [Town of Clinton v. Ross](#), 226 N.C. 682, 40 S.E.2d 593 (1946).
- 7 [Antonello v. City of San Diego](#), 16 Cal. App. 3d 161, 93 Cal. Rptr. 820 (4th Dist. 1971); [People v. Nebbia](#), 262 N.Y. 259, 186 N.E. 694 (1933), *aff'd*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); [Ex parte Smith](#), 152 Tex. Crim. 126, 211 S.W.2d 204 (1948).
- 8 [Jardine v. City of Pasadena](#), 199 Cal. 64, 248 P. 225, 48 A.L.R. 509 (1926); [Freckler v. City of Dayton](#), 153 Ohio St. 14, 41 Ohio Op. 109, 90 N.E.2d 851 (1950).
A penal statute absolutely forbidding any person from selling any coverless magazine, regardless of circumstances or reasons, is arbitrary and unconstitutional. [People v. Bunis](#), 9 N.Y.2d 1, 210 N.Y.S.2d 505, 172 N.E.2d 273 (1961).
- 9 [Morton v. Superior Court of State, In and For San Mateo County](#), 124 Cal. App. 2d 577, 269 P.2d 81, 47 A.L.R.2d 478 (1st Dist. 1954); [Good Humor Corporation v. City of New York](#), 290 N.Y. 312, 49 N.E.2d 153 (1943).

- 10 O'Hagen v. Board of Zoning Adjustment, 19 Cal. App. 3d 151, 96 Cal. Rptr. 484 (1st Dist. 1971); Trio
Distributor Corp. v. City of Albany, 2 N.Y.2d 690, 163 N.Y.S.2d 585, 143 N.E.2d 329 (1957).
11 Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388, 126 A.L.R. 729 (1939).
12 Anthony v. Veatch, 189 Or. 462, 220 P.2d 493 (1950).
13 Lawton v. Stewart Dry Goods Co., 197 Ky. 394, 247 S.W. 14, 26 A.L.R. 686 (1923).

End of Document

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

b. Mode of Regulation

§ 364. Fixing terms, conditions, and restrictions as to business or occupation pursuant to police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Validity of statute, ordinance, or regulation requiring fingerprinting of those engaging in specified occupations, 41 A.L.R.3d 732](#)

[Validity and construction of statutes or ordinances regulating telephone answering services, 35 A.L.R.3d 1430](#)

The legislature may, under its police power, impose terms and conditions restricting the right to engage in particular businesses and occupations.¹ The power to regulate a particular business, trade, or calling implies the power to fix reasonable terms upon which it may be pursued and to prohibit its exercise, except on the terms and in the manner so prescribed.² However, if a calling is so innocent that it must be left open to all alike, the state may not attach conditions to the right to engage therein.³

Regulations concerning businesses or occupations often take the form of preliminary requirements to the carrying on of the occupation,⁴ such as registering.⁵ Furthermore, statutes, ordinances, or regulations in furtherance of the police power may

require that applicants for certain specified occupations be fingerprinted.⁶ These laws do not violate equal protection,⁷ the right to personal liberty or privacy,⁸ due process,⁹ the privilege against self-incrimination,¹⁰ or the spirit or purpose generally of the Constitution.¹¹ Similarly, a regulation requiring a certain type of business to furnish the police department with fingerprints, photographs, and penal histories of all employees is valid.¹² When occupations are likely to become inimical to public welfare, unless the number is limited by law, the police power may restrict the number, as a reasonable basis exists for the classification made, and there is justification for the incidental denial of full enjoyment of the privilege by those who are outside the classification.¹³

Restrictions occasionally apply to the class of persons permitted to engage in certain callings, as where a state limits to corporations the right to engage in a particular business.¹⁴ On the other hand, the state also may prohibit a corporation from engaging in certain other callings.¹⁵

Membership in an association cannot be required as a prerequisite for admission to an ordinary business that is in its nature perfectly legitimate.¹⁶ The state may not to make an unreasonable regulation restricting the right to use business property for business purposes.¹⁷ Similarly, the fact that unscrupulous persons may enter into fraudulent contracts respecting a lawful business is not a sufficient ground for the legislature to prohibit lawful contracts concerning that business.¹⁸

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Footnotes

- 1 [Swift & Co. v. Peterson](#), 192 Or. 97, 233 P.2d 216 (1951).
A regulation which authorized revocation, cancellation, or suspension of a liquor license for permitting on the licensed premises any person to appear nude or attired in such a way as to expose to view the genital area was not unconstitutional since the state may constitutionally prohibit from licensed premises performances that partake more of gross sexuality than communication, and the regulation in question represented the state's continuing and legitimate effort to accomplish that goal. [92-07 Restaurant, Inc. v. New York State Liquor Authority](#), 80 A.D.2d 603, 435 N.Y.S.2d 989 (2d Dep't 1981).
- 2 [Trio Distributor Corp. v. City of Albany](#), 2 A.D.2d 326, 156 N.Y.S.2d 912 (3d Dep't 1956), judgment rev'd on other grounds, 2 N.Y.2d 690, 163 N.Y.S.2d 585, 143 N.E.2d 329 (1957).
- 3 [People v. Perretta](#), 253 N.Y. 305, 171 N.E. 72, 84 A.L.R. 636 (1930).
- 4 [Hudson County News Co. v. Sills](#), 41 N.J. 220, 195 A.2d 626 (1963).
- 5 [Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State](#), 392 So. 2d 1296 (Fla. 1980).
- 6 [Walton v. City of Atlanta](#), 181 F.2d 693 (5th Cir. 1950); [Thom v. New York Stock Exchange](#), 306 F. Supp. 1002 (S.D. N.Y. 1969), judgment aff'd, 425 F.2d 1074 (2d Cir. 1970); [Sibert v. Department of Alcoholic Beverage Control](#), 169 Cal. App. 2d 563, 337 P.2d 882 (2d Dist. 1959); [Norman v. City of Las Vegas](#), 64 Nev. 38, 177 P.2d 442 (1947).
- 7 [Thom v. New York Stock Exchange](#), 306 F. Supp. 1002 (S.D. N.Y. 1969), judgment aff'd, 425 F.2d 1074 (2d Cir. 1970); [Sibert v. Department of Alcoholic Beverage Control](#), 169 Cal. App. 2d 563, 337 P.2d 882 (2d Dist. 1959).
- 8 [Thom v. New York Stock Exchange](#), 306 F. Supp. 1002 (S.D. N.Y. 1969), judgment aff'd, 425 F.2d 1074 (2d Cir. 1970); [Brown v. Brannon](#), 399 F. Supp. 133 (M.D. N.C. 1975), aff'd, 535 F.2d 1249 (4th Cir. 1976); [Hamilton v. New Jersey Real Estate Commission, Dept. of Ins.](#), 117 N.J. Super. 345, 284 A.2d 564 (App. Div. 1971).
- 9 [Thom v. New York Stock Exchange](#), 306 F. Supp. 1002 (S.D. N.Y. 1969), judgment aff'd, 425 F.2d 1074 (2d Cir. 1970); [Sibert v. Department of Alcoholic Beverage Control](#), 169 Cal. App. 2d 563, 337 P.2d 882 (2d Dist. 1959).
- 10 [People v. Stuller](#), 10 Cal. App. 3d 582, 89 Cal. Rptr. 158, 41 A.L.R.3d 712 (4th Dist. 1970).

- 11 M. Itzkowitz & Sons v. Geraghty, 139 Misc. 163, 247 N.Y.S. 703 (Sup 1931).
12 Harriman v. City of Beverly Hills, 275 Cal. App. 2d 918, 80 Cal. Rptr. 426, 35 A.L.R.3d 1421 (2d Dist.
1969) (telephone answering service employees).
13 Flax v. City of Richmond, 189 Va. 273, 52 S.E.2d 250 (1949) (pawnshops).
14 Dillingham v. McLaughlin, 264 U.S. 370, 44 S. Ct. 362, 68 L. Ed. 742 (1924).
15 See, for example, People by Lefkowitz v. Lawrence Peska Associates, Inc., 90 Misc. 2d 59, 393 N.Y.S.2d
650 (Sup 1977) (practice of law).
16 Munson v. City of Colorado Springs, 35 Colo. 506, 84 P. 683 (1906).
17 Piper v. Ekern, 180 Wis. 586, 194 N.W. 159, 34 A.L.R. 32 (1923).
18 State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512 (1930).

End of Document

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American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

b. Mode of Regulation

§ 365. Fixing terms, conditions, and restrictions as to business or occupation pursuant to police power—Restrictions to qualified persons

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The power of the state to provide for the general welfare authorizes it to establish that regulations that will secure or tend to secure the people against the consequences of ignorance and incapacity. To that end, it may exact a certain degree of skill and learning in professions and pursuits that concern the public health and welfare and are of such a character that a special course of study, training, or experience is needed to qualify.¹ The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only where they have no relation to the calling or profession or are unattainable by reasonable study and application that they can operate to deprive a person of the right to pursue a lawful vocation.² The right to regulate these professions and occupations extends to those already engaged in them as well as to those seeking for the first time admission to their ranks, as it is generally recognized that no matter how long a person has been in the practice of a profession, such person does not have any vested right to continue in it.³

The exercise of the police power in this respect is, however, not wholly limited to the learned professions and to those occupations that require special training and experience. It also extends to business pursuits that involve none of these characteristics but nonetheless affect the public health, safety, or comfort.⁴ Furthermore, if a calling is such that the dishonest

and unworthy should not be permitted to take advantage of the opportunities presented by it, they may be prohibited from engaging in the pursuit.⁵ Thus, certain occupations or businesses may be prohibited to those who have a past criminal record.⁶

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Footnotes

- 1 [Semler v. Oregon State Bd. of Dental Examiners](#), 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086 (1935); [In re Porterfield](#), 28 Cal. 2d 91, 168 P.2d 706, 167 A.L.R. 675 (1946); [State v. Ballance](#), 229 N.C. 764, 51 S.E.2d 731, 7 A.L.R.2d 407 (1949); [Clayton v. Bennett](#), 5 Utah 2d 152, 298 P.2d 531 (1956).
As to the authority to regulate lawful professions, generally, see § 358.
- 2 [Eye Dog Foundation v. State Bd. of Guide Dogs for Blind](#), 67 Cal. 2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 (1967).
- 3 [Paterson v. University of State of N.Y.](#), 14 N.Y.2d 432, 252 N.Y.S.2d 452, 201 N.E.2d 27 (1964); [Kelly v. State](#), 139 Tex. Crim. 156, 138 S.W.2d 1075 (1940).
No one can acquire a vested right to continue in a business, trade, or occupation that is subject to legislative control and regulation under the police power of the state. [George Benz Sons Inc. v. Ericson](#), 227 Minn. 1, 34 N.W.2d 725 (1948).
- 4 [People ex rel. Lodes v. Department of Health of City of New York](#), 189 N.Y. 187, 82 N.E. 187 (1907).
- 5 [People v. Perretta](#), 253 N.Y. 305, 171 N.E. 72, 84 A.L.R. 636 (1930).
- 6 [De Veau v. Braisted](#), 5 N.Y.2d 236, 183 N.Y.S.2d 793, 157 N.E.2d 165 (1959), judgment *aff'd*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960).

End of Document

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Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

b. Mode of Regulation

§ 366. Fixing terms, conditions, and restrictions as to business or occupation pursuant to police power—Restrictions as to place and time

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Validity, under federal and state establishment of religion provisions, of prohibition of sale of intoxicating liquors on specific religious holidays, 27 A.L.R.4th 1155](#)

[Validity, construction, and effect of "Sunday closing" or "blue" laws—modern status, 10 A.L.R.4th 246](#)

Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulation as to the locality in which they are conducted;¹ in some instances the conduct of a business in a particular place may be prohibited entirely.²

As a general proposition, regulations fixing a closing hour for certain businesses depend for their validity upon the nature of the business sought to be regulated. Such laws are valid if the public health, safety, morals, or welfare may be affected by keeping the business open after certain hours.³ However, laws requiring businesses of a purely mercantile and commercial nature to

close at a specified time have been held unconstitutional⁴ where such regulations do not directly or remotely tend to benefit the public health, morals, safety, or general welfare.⁵

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Footnotes

- 1 [Pierce Oil Corp. v. City of Hope](#), 248 U.S. 498, 39 S. Ct. 172, 63 L. Ed. 381 (1919); [Hadacheck v. Sebastian](#), 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); [Reinman v. City of Little Rock](#), 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900 (1915); [Murphy v. People of State of California](#), 225 U.S. 623, 32 S. Ct. 697, 56 L. Ed. 1229 (1912).
- 2 [State v. Clausen](#), 65 Wash. 156, 117 P. 1101 (1911).
- 3 [People v. Kuc](#), 272 N.Y. 72, 4 N.E.2d 939, 107 A.L.R. 1272 (1936).
City ordinances regulating the hours that vendors of alcohol were permitted to sell alcohol and regulating admittance of underage patrons to establishments that sell alcohol left open ample alternative channels of communication, on nightclub's free-speech claim; the ordinances did not limit or regulate the music the nightclub could present, and the nightclub presented no evidence that persons aged 18 to 21 were unable to hear elsewhere the music presented at the nightclub. [219 South Atlantic Blvd. Inc. v. City of Ft. Lauderdale, Fla.](#), 239 F. Supp. 2d 1265 (S.D. Fla. 2002).
- 4 [Olds v. Klotz](#), 131 Ohio St. 447, 6 Ohio Op. 129, 3 N.E.2d 371 (1936).
- 5 [City of Jackson v. Murray-Reed-Slone & Co.](#), 297 Ky. 1, 178 S.W.2d 847 (1944); [Fasino v. Mayor and Members of Borough Council of Borough of Montvale](#), 122 N.J. Super. 304, 300 A.2d 195 (Law Div. 1973), judgment aff'd, 129 N.J. Super. 461, 324 A.2d 77 (App. Div. 1973); [City of Cincinnati v. Correll](#), 141 Ohio St. 535, 26 Ohio Op. 116, 49 N.E.2d 412 (1943).

End of Document

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16A Am. Jur. 2d Constitutional Law § 367

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

B. Exercise of Police Power

3. Regulation and Prohibition of Occupations and Businesses

b. Mode of Regulation

§ 367. Fixing terms, conditions, and restrictions as to business or occupation pursuant to police power—Restrictions as to price

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Validity, Construction, and Application of State Statute Forbidding Unfair Trade Practice or Competition by Discriminatory Allowance of Rebates, Commissions, Discounts, or the Like, 83 A.L.R.6th 419](#)

[Validity, construction, and application of state statutory provision prohibiting sales of commodities below cost-modern cases, 41 A.L.R.4th 612](#)

[Validity, construction, and effect of laws or regulations requiring merchants to affix sale price to each item of consumer goods, 7 A.L.R.4th 792](#)

[Validity and construction of statute or ordinance establishing rent control benefit or rent subsidy for elderly tenants, 5 A.L.R.4th 922](#)

[Validity of state statute or regulation fixing minimum prices at which alcoholic beverages may be sold at retail, 96 A.L.R.3d 639](#)

Legislation concerning the sale of goods and incidentally affecting prices is clearly valid.¹ The authority of the government to fix prices does not ordinarily exist with respect to merely private property or business but ordinarily may be exercised only if the business or property has somehow become affected with a public interest.² However, the right of the owner of a commodity to determine the price of resale is subject to the legitimate exercise of the police power.³ A state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote the public welfare, whether by promoting free competition by laws aimed at monopolies or by curbing harmful competition by fixing minimum prices.⁴ Thus, where legislation affects an entire class of articles that comprise a reasonable subject of classification and where the main purpose of the legislation is otherwise justified under the police power, such as to curb unfair competition, the legislature may authorize the fixing of prices for that class of articles quite aside from the degree to which traffic in them may affect the public interest.⁵

The United States Supreme Court has recognized that the government may intervene in the marketplace where—

— rates or prices are artificially inflated as a result of a monopoly or near monopoly.⁶

— a discrepancy exists between supply and demand in the market for a certain product.⁷

— rent controls are necessary to prevent excessive and unreasonable rent increases caused by a growing shortage of and increasing demand for housing in a particular area.⁸

— price control regulations and taxes are being imposed on government contractors.⁹

A price control law is unconstitutional, as a denial of due process of law, if it is arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is otherwise free to adopt.¹⁰

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Footnotes

- 1 [Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934).
- 2 [City of Mobile v. Rouse](#), 233 Ala. 622, 173 So. 266, 111 A.L.R. 349 (1937); [People v. Weller](#), 237 N.Y. 316, 143 N.E. 205, 38 A.L.R. 613 (1924), [aff'd](#), 268 U.S. 319, 45 S. Ct. 556, 69 L. Ed. 978 (1925); [Herrin v. Arnold](#), 1938 OK 440, 183 Okla. 392, 82 P.2d 977, 119 A.L.R. 1471 (1938).
- 3 [Joseph Triner Corporation v. McNeil](#), 363 Ill. 559, 2 N.E.2d 929, 104 A.L.R. 1435 (1936), [aff'd](#), 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936); [Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets](#), 231 La. 51, 90 So. 2d 343, 60 A.L.R.2d 410 (1956); [Com. v. Zasloff](#), 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120 (1940).
- 4 [Highland Farms Dairy v. Agnew](#), 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937) (minimum price for milk); [Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); [Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.](#), 11 Cal. 2d 634, 82 P.2d 3, 118 A.L.R. 486 (1938); [Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.](#), 178 Md. 38, 12 A.2d 201 (1940).
- 5 [Max Factor & Co. v. Kunsman](#), 5 Cal. 2d 446, 55 P.2d 177 (1936), [aff'd](#), 299 U.S. 198, 57 S. Ct. 147, 81 L. Ed. 122 (1936).
- 6 [F.C.C. v. Florida Power Corp.](#), 480 U.S. 245, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987) (approving limits on rates charged to cable companies for access to telephone poles); [Federal Power Commission v. Texaco Inc.](#), 417 U.S. 380, 94 S. Ct. 2315, 41 L. Ed. 2d 141 (1974) (recognizing that federal regulation of the natural gas market was in response to the threat of monopoly pricing).
- 7 [Highland Farms Dairy v. Agnew](#), 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937); [Nebbia v. People of New York](#), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934) (allowing the fixing of a minimum price for milk to offset the effect on prices of a "flood of surplus milk").

- 8 [Pennell v. City of San Jose](#), 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988).
- 9 [U.S. v. City of Detroit](#), 355 U.S. 466, 78 S. Ct. 474, 2 L. Ed. 2d 424 (1958); [State of Alabama v. King & Boozer](#), 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, 140 A.L.R. 615 (1941).
- 10 [Pennell v. City of San Jose](#), 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988); [In re Permian Basin Area Rate Cases](#), 390 U.S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968).
- A price-fixing statute is invalid if it is not related to the public health, safety, morals, or general welfare. [State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners](#), 40 Cal. 2d 436, 254 P.2d 29 (1953).
- The power to regulate private business by price-fixing may be invoked only where the measure is seen to have a reasonable relation to the public welfare and is neither arbitrary nor discriminatory. [Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets](#), 231 La. 51, 90 So. 2d 343, 60 A.L.R.2d 410 (1956).
- Statutes fixing or regulating prices for personal services are constitutional only when enacted with respect to a business affected with a public interest. [City of Mobile v. Rouse](#), 233 Ala. 622, 173 So. 266, 111 A.L.R. 349 (1937); [In re Kazas](#), 22 Cal. App. 2d 161, 70 P.2d 962 (4th Dist. 1937); [Duncan v. City of Des Moines](#), 222 Iowa 218, 268 N.W. 547 (1936).

End of Document

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16A Am. Jur. 2d Constitutional Law VIII C Refs.

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VIII. Police Power

C. Limitations on Police Power

[Topic Summary](#) | [Correlation Table](#)

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West's A.L.R. Digest, [States](#)  4.4(2), 21(2)

End of Document

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16A Am. Jur. 2d Constitutional Law § 368

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VIII. Police Power

C. Limitations on Police Power

1. In General

§ 368. Limitations on police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power of the state is limited by (1) the rights guaranteed by the Constitution, (2) the necessity of a legitimate public purpose, and (3) a reasonable exercise of the power.¹ The legislature may not, under the guise of regulating in the public interest, impose conditions that are on their face unreasonable, arbitrary, discriminatory, or confiscatory.² Moreover, the police power is, by its nature, exercisable only restrictively as restriction is implicit in the power itself.³

Although the judicial branch of government is the final arbiter of the limitations that apply to the police power,⁴ the notion that courts may freely assume the role of arbiters of public policy is very much exaggerated for the courts should especially avoid assuming such a role in the face of a statutory scheme that enunciates its own policy considerations.⁵ The limitations on the police power have never been drawn with exactness by the courts,⁶ and its boundary line cannot be determined in advance by any general formula.⁷

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Footnotes

1

[State v. White](#), 556 S.W.3d 110 (Mo. Ct. App. W.D. 2018).

As to constitutional limitations on the exercise of the police power, see §§ 378 to 399.

As to the purposes for which police power may be exercised, see §§ 346 to 354.

As to the reasonableness of the exercise of police power, see §§ 370, 371.

Central Platte Natural Resources Dist. v. City of Fremont, 250 Neb. 252, 549 N.W.2d 112 (1996); State v. Anderson, 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991).

The form of government regulation chosen must bear a reasonable or rational relationship to the public good being pursued by the government and must not unreasonably restrict the particular rights being curtailed. Peppies Courtesy Cab Co. v. City of Kenosha, 165 Wis. 2d 397, 475 N.W.2d 156 (1991).

People v. Arlen Service Stations, 284 N.Y. 340, 31 N.E.2d 184 (1940) (rejected on other grounds by, State v. Redman Petroleum Corp., 77 Nev. 163, 360 P.2d 842 (1961)).

§ 376.

Revere Copper and Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81 (D.C. Cir. 1980).

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926); Shealy v. Southern Ry. Co., 127 S.C. 15, 120 S.E. 561 (1924); Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393 (1921).

Eubank v. City of Richmond, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912); Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944); State ex rel. Roth v. Waterfield, 1933 OK 546, 167 Okla. 209, 29 P.2d 24 (1933).

End of Document

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16A Am. Jur. 2d Constitutional Law § 369

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

1. In General

§ 369. Territorial limitations on police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The police power of a state generally may not be projected beyond its territorial boundaries.¹ Thus, for example, a state cannot, under the police power, regulate out-of-state activities conducted by an organization located in that other state.² However, a state consumer regulation is not invalid because it also protects consumers outside the state.³

A state's police power jurisdiction statutes are not invalid as violating equal protection or due process where they subject persons residing within a few miles of a city's corporate limits to the city's police, sanitary, and business-licensing powers, and to the criminal jurisdiction of the city's courts, even though they do not extend the right to vote in municipal elections.⁴

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Footnotes

- ¹ [Thurlow v. Com. of Mass.](#), 46 U.S. 504, 5 How. 504, 12 L. Ed. 256, 1847 WL 5992 (1847) (overruled in part on other grounds by, [Leisy v. Hardin](#), 135 U.S. 100, 12 Ky. L. Rptr. 167, 10 S. Ct. 681, 34 L. Ed. 128 (1890)); [In re Doe](#), 99 Haw. 522, 57 P.3d 447 (2002).
- ² [Bigelow v. Virginia](#), 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975) (legal abortion services).
- ³ [Brown v. Market Development, Inc.](#), 41 Ohio Misc. 57, 68 Ohio Op. 2d 276, 70 Ohio Op. 2d 113, 322 N.E.2d 367 (C.P. 1974).

4 [Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 99 S. Ct. 383, 58 L. Ed. 2d 292, 26 Fed. R. Serv. 2d 635 \(1978\).](#)

End of Document

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

a. Reasonableness

§ 370. Reasonableness of exercise of police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The fixed rule and basic standard by which the validity of all exercises of the police power is tested is that the police power of the state extends only to measures that are reasonable,¹ as assessed under all of the circumstances.² The requirement of reasonableness arises from due process, and an unreasonable exercise of the police power results in a deprivation without due process.³ Conversely, a reasonable exercise of the state's police power is not constitutionally infirm as a violation of due process.⁴

The validity of a police regulation therefore primarily depends on whether, under all the existing circumstances, the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.⁵ The statute must be reasonably designed to remedy the evils that the legislature has identified as a threat.⁶ Under the broad authority of the police power, the legislature may enact laws concerning the health, safety, and welfare of the people as long as the regulations are not arbitrary or unreasonable.⁷

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- ¹ [Bal Harbour Village v. Welsh](#), 879 So. 2d 1265 (Fla. 3d DCA 2004); [Zuckerman v. Bevin](#), 565 S.W.3d 580 (Ky. 2018); [Morial v. Smith & Wesson Corp.](#), 785 So. 2d 1 (La. 2001); [Kane v. Board of Appeals of Prince](#)

George's County, 390 Md. 145, 887 A.2d 1060 (2005); *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. Ct. App. W.D. 2013).

The state may regulate any business or the use of any property in the interest of the public welfare or the public convenience, provided it is done reasonably. *Parillo Food Group, Inc. v. Board of Zoning Appeals of the City of New Haven*, 169 Conn. App. 598, 151 A.3d 864 (2016).

Once it is established that a regulation enacted pursuant to the police power has a valid basis, it need only be shown to sustain its constitutionality that it is reasonably related to the objective for which it was enacted. *Suffolk Outdoor Advertising Co., Inc. v. Hulse*, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977). *Hunter v. Green*, 142 Fla. 104, 194 So. 379 (1940); *State v. Pendarvis*, 181 Kan. 560, 313 P.2d 237 (1957); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001); *Ex parte Tomlinson*, 54 Okla. Crim. 367, 22 P.2d 398 (1933); *Mendiola v. Graham*, 139 Or. 592, 10 P.2d 911 (1932).

Hoff v. State, 39 Del. 134, 197 A. 75 (Super. Ct. 1938).

As to protection against arbitrary or unreasonable legislative action, as a matter of substantive due process, generally, see § 958.

Health Ins. Ass'n of America v. Harnett, 44 N.Y.2d 302, 405 N.Y.S.2d 634, 376 N.E.2d 1280 (1978).

People v. Falbe, 189 Ill. 2d 635, 244 Ill. Dec. 901, 727 N.E.2d 200 (2000); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001); *State v. Anderson*, 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991); *Ex parte Smith*, 152 Tex. Crim. 126, 211 S.W.2d 204 (1948).

People v. Tolbert, 354 Ill. App. 3d 94, 289 Ill. Dec. 498, 820 N.E.2d 6 (1st Dist. 2004).

State v. Sherman, 156 Idaho 435, 327 P.3d 993 (Ct. App. 2014).

End of Document

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16A Am. Jur. 2d Constitutional Law § 371

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

a. Reasonableness

§ 371. Determination of reasonableness of exercise of police power; tests

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

It is difficult, if not impossible, to lay down an all-embracing test of reasonableness by which the great variety of situations impelling legislative regulation can be measured.¹ What constitutes a reasonable interference with private property by the police power is a matter for which there is no certain test but one which rests on human judgment,² natural justice, and common sense.³ Whether a restriction is reasonable may depend on many factors, typically with no single factor being decisive.⁴

Legislation must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious.⁵ A regulation is unreasonable that ostensibly seeks the protection of the public safety but which in fact runs counter to the common experience of society.⁶ The police power, in furtherance of public safety, health, and welfare, is coextensive with the public need, and the reasonableness of its exercise must be measured largely by the same standard.⁷ The exercise of police power is proper if supported by any state of facts, either known or which could be reasonably assumed.⁸

A measure taken under the state's police power is reasonable when the action is, under all the circumstances, reasonably necessary and designed to accomplish a purpose properly falling within the scope of the police power,⁹ or when the regulation is reasonably necessary to protect public safety or welfare and substantially related to the legitimate ends sought.¹⁰ Thus, a court may not invalidate a statute enacted pursuant to a state's police power, unless the law has no reasonable relation to a legitimate purpose accomplished by the enactment.¹¹ Under a state constitution, legislation may be constitutional so long as it serves to

promote a public purpose; is not an unreasonable, arbitrary, or capricious interference with a private interest; and the means chosen bear a rational relation to the public purpose sought to be served.¹²

The "reasonableness," of police power is not synonymous with "expediency," as matters of expediency are wholly for legislative consideration, while reasonableness is subject to judicial inquiry.¹³ The reasonableness of an exercise of police power must be considered in the light of current economic conditions.¹⁴ Whether a regulation adopted in the exercise of the police power is reasonable depends upon the character or nature of the condition to be remedied.¹⁵ Similarly, all of the surrounding facts and circumstances must be assessed¹⁶ as well as past legislative responses in similar cases.¹⁷ If a court is convinced that the object of a regulation is one that reasonable persons could find fairly debatable as to reasonableness, the regulation should be sustained.¹⁸

An economic or other hardship is no argument against the constitutional validity of an otherwise valid exercise of the state's police power.¹⁹ Thus, economic hardship on a party affected by legislation that was enacted under the state's police power does not justify a finding of unreasonableness or by itself constitute a reason to void the law.²⁰ The fact that a business might have to change its method of operation or that the value of business property would be adversely affected does not make the regulation per se unreasonable.²¹

Observation:

The reasonableness of a regulation asserted to constitute an exercise of the police power is to be determined as of the time the validity of the regulation is drawn in question. Even though a police enactment may have been, or may have seemed to be, valid when made, later events or later discovered facts may show it to be arbitrary and confiscatory.²²

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Footnotes

- 1 [Town of Somers v. Camarco](#), 308 N.Y. 537, 127 N.E.2d 327 (1955).
- 2 [Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses](#), 233 Ind. 83, 117 N.E.2d 115 (1954).
- 3 [City of Raleigh v. Norfolk Southern Ry. Co.](#), 4 N.C. App. 1, 165 S.E.2d 745 (1969).
- 4 [People v. Calvar Corporation](#), 286 N.Y. 419, 36 N.E.2d 644, 136 A.L.R. 1376 (1941).
- 5 [State v. Anderson](#), 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991); [Croxtton v. State](#), 1939 OK 504, 186 Okla. 249, 97 P.2d 11 (1939).
A town regulation which prohibits dumping, within the town, of garbage which originates outside of the town is an entirely reasonable and proper exercise of the police power. [Wiggins v. Town of Somers](#), 4 N.Y.2d 215, 173 N.Y.S.2d 579, 149 N.E.2d 869 (1958).
- 6 [Lakewood Exp. Service v. Board of Public Utility Com'rs](#), 1 N.J. 45, 61 A.2d 730, 7 A.L.R.2d 1259 (1948).
- 7 [Hodge Drive-It-Yourself Co. v. City of Cincinnati](#), 123 Ohio St. 284, 9 Ohio L. Abs. 283, 175 N.E. 196, 77 A.L.R. 889 (1931), *aff'd*, 284 U.S. 335, 52 S. Ct. 144, 76 L. Ed. 323 (1932).
A lower court erred in holding unconstitutional, as violative of due process, a local ordinance prohibiting the operation of self-service gasoline stations where the party challenging the ordinance had failed to show

beyond a reasonable doubt that there was no rational basis for the adoption of the law. [Town of North Hempstead v. Exxon Corp.](#), 53 N.Y.2d 747, 439 N.Y.S.2d 342, 421 N.E.2d 834 (1981).

A county ordinance requiring automobile graveyards, junkyards, or repair shops located within specified distances from public roads, schools, churches, or residences to be entirely surrounded by wire fencing and vegetation is a valid exercise of the police power where the stated objectives of the ordinance were to ensure the safety of county residents, to preserve the environment and physical integrity of the land, and to protect county citizens from the spread of disease and a proliferation of rodents and mosquitoes; the objectives of the ordinance are within the scope of the police power; the ordinance establishes reasonable means to achieve its objectives; and the interference with the right of landowners to use their property is reasonable in degree.

[County of Hoke v. Byrd](#), 107 N.C. App. 658, 421 S.E.2d 800 (1992).

[City of Kansas City v. Jordan](#), 174 S.W.3d 25 (Mo. Ct. App. W.D. 2005).

[City of Baton Rouge v. State](#), ex rel. Dept. of Social Services, 970 So. 2d 985 (La. Ct. App. 1st Cir. 2007).

[State v. Jorgenson](#), 179 Wash. 2d 145, 312 P.3d 960 (2013).

[Bronco Wine Co. v. Jolly](#), 129 Cal. App. 4th 988, 29 Cal. Rptr. 3d 462 (3d Dist. 2005), as modified on denial of reh'g, (June 20, 2005).

[State v. Eakins](#), 720 N.W.2d 597 (Minn. Ct. App. 2006).

[In re Hall](#), 50 Cal. App. 786, 195 P. 975 (2d Dist. 1920).

[West Coast Hotel Co. v. Parrish](#), 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937); [Liquor Store v. Continental Distilling Corp.](#), 40 So. 2d 371 (Fla. 1949).

[Sandstrom v. California Horse Racing Bd.](#), 31 Cal. 2d 401, 189 P.2d 17, 3 A.L.R.2d 90 (1948).

[Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses](#), 233 Ind. 83, 117 N.E.2d 115 (1954); [State v. Langley](#), 53 Wyo. 332, 84 P.2d 767 (1938).

[Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.](#), 11 Cal. 2d 634, 82 P.2d 3, 118 A.L.R. 486 (1938).

[Lester v. City of St. Petersburg](#), 183 So. 2d 589 (Fla. 2d DCA 1966).

[N.H. Lyons & Co. v. Corsi](#), 3 N.Y.2d 60, 163 N.Y.S.2d 677, 143 N.E.2d 392 (1957).

[State ex rel. Faulk v. CSG Job Center](#), 117 Wash. 2d 493, 816 P.2d 725 (1991) (abrogated on other grounds by, [Yim v. City of Seattle](#), 194 Wash. 2d 682, 451 P.3d 694 (2019)).

[State ex rel. Faulk v. CSG Job Center](#), 117 Wash. 2d 493, 816 P.2d 725 (1991) (abrogated on other grounds by, [Yim v. City of Seattle](#), 194 Wash. 2d 682, 451 P.3d 694 (2019)).

[Defiance Milk Products Co. v. Du Mond](#), 309 N.Y. 537, 132 N.E.2d 829 (1956).

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16A Am. Jur. 2d Constitutional Law § 372

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Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

b. Appropriateness of Means

§ 372. General principle regarding appropriateness of means of exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

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[Validity, construction, and application of nonsmoking regulations, 65 A.L.R.4th 1205](#)

For a statute to be a proper exercise of police power, it must be appropriate and reasonably necessary to accomplish a purpose within the scope of the police power.¹ Generally, in order for a police measure to be reasonable, the means adopted must be reasonably necessary and appropriate for the accomplishment of the legitimate objects falling within the scope of the power.² The means must not be unduly oppressive upon individuals.³

Although the government need not employ the least restrictive means when exercising its police powers, the means must be narrowly tailored to achieve the desired objective.⁴ The law may not be more drastic than is reasonable to accomplish the end for which the law was adopted.⁵ Thus, the governmental purpose may not be achieved by means that sweep unnecessarily broadly and thereby invade the area of constitutionally protected freedoms.⁶

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Footnotes

- 1 [Dittmer v. Terzian](#), 6 Misc. 3d 590, 787 N.Y.S.2d 617 (Sup 2004); [Satterfield v. Crown Cork & Seal Co., Inc.](#), 268 S.W.3d 190 (Tex. App. Austin 2008).
- 2 [Taylor v. Zoning Bd. Of Appeals Of Town Of Wallingford](#), 65 Conn. App. 687, 783 A.2d 526 (2001); [King v. State](#), 272 Ga. 788, 535 S.E.2d 492 (2000); [State v. Wilson](#), 267 Kan. 550, 987 P.2d 1060 (1999); [Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control](#), 216 La. 148, 43 So. 2d 248, 14 A.L.R.2d 680 (1949); [Ex parte Smith](#), 152 Tex. Crim. 126, 211 S.W.2d 204 (1948).
- 3 [Taylor v. Zoning Bd. Of Appeals Of Town Of Wallingford](#), 65 Conn. App. 687, 783 A.2d 526 (2001); [King v. State](#), 272 Ga. 788, 535 S.E.2d 492 (2000); [Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection](#), 584 Pa. 494, 884 A.2d 867 (2005) (upholding the Commonwealth's regulation relating to environmental factors in granting landfill permits).
- 4 [In re Petition of Bailey](#), 626 N.W.2d 190 (Minn. Ct. App. 2001).
- 5 [State v. Williams](#), 253 N.C. 337, 117 S.E.2d 444, 92 A.L.R.2d 513 (1960).
- 6 [Zwickler v. Koota](#), 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967).

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16A Am. Jur. 2d Constitutional Law § 373

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

b. Appropriateness of Means

§ 373. Test of appropriateness of means of exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

Laws passed by virtue of the police power must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals, or general welfare of the public,¹ and must not be arbitrary, discriminatory, capricious, or unreasonable.² Thus, the police power has constitutional limits, and any measure enacted or adopted in its exercise must bear some reasonable relation to the purposes for which the power may be exercised.³

If a police measure is to be upheld as embodying a means appropriate to the accomplishment of a particular purpose for which the police power may be exercised, the measure must be rational.⁴ The validity of a statute enacted under the police power does not depend upon the absolute assurance that the purpose designed can in fact or probably be fully accomplished as contemplated or upon the certainty that it will best serve the purpose intended.⁵ It suffices that the statute may be reasonably expected to correct the feared harm.⁶ Thus, to determine the validity of a statute passed pursuant to the police power, a court considers whether the challenged statute tends to promote the health, peace, morals, education, good order, safety, or welfare of the people and whether the requirements imposed by the challenged statute bear a reasonable and substantial relation to accomplishing the law's purpose.⁷

The effect and the professed purpose must substantially agree and coincide.⁸ The mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not in itself bring that statute within the police power of a state,⁹ for there

must always be a clear connection between the actual provisions of a police regulation and its avowed purpose.¹⁰ The exercise of the power must have a substantial basis and cannot be made a mere pretext for legislation that does not fall within it.¹¹

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Footnotes

- 1 Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).
- 2 State v. Thompkins, 75 Ohio St. 3d 558, 1996-Ohio-264, 664 N.E.2d 926 (1996).
- 3 Weipert v. Illinois Dept. of Professional Regulation, 337 Ill. App. 3d 282, 271 Ill. Dec. 621, 785 N.E.2d 553 (4th Dist. 2003); State v. Arnold, 147 N.C. App. 670, 557 S.E.2d 119 (2001), judgment aff'd, 356 N.C. 291, 569 S.E.2d 648 (2002).
- 4 Morgan v. Secretary of Housing and Urban Development, 985 F.2d 1451 (10th Cir. 1993) (holding that a rational basis existed for regulating mobile home space rentals with respect to familial status); State v. Wilder, 138 Idaho 644, 67 P.3d 839 (Ct. App. 2003).
- 5 Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920).
- 6 McInerney v. Ervin, 46 So. 2d 458 (Fla. 1950).
- 7 County of Hoke v. Byrd, 107 N.C. App. 658, 421 S.E.2d 800 (1992); State ex rel. Faulk v. CSG Job Center, 117 Wash. 2d 493, 816 P.2d 725 (1991) (abrogated on other grounds by, Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019)).
- 8 State v. Finney, 65 Idaho 630, 150 P.2d 130 (1944); Teegardin v. Foley, 166 Ohio St. 449, 2 Ohio Op. 2d 462, 143 N.E.2d 824 (1957); Quesenberry v. Estep, 142 W. Va. 426, 95 S.E.2d 832 (1956).
- 9 § 374.
- 10 Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal. 2d 813, 249 P.2d 545 (1952) (rejected on other grounds by, State v. Redman Petroleum Corp., 77 Nev. 163, 360 P.2d 842 (1961)); Allen v. Trueman, 100 Utah 36, 110 P.2d 355 (1941).
- 11 Union Carbide & Carbon Corp. v. White River Distributors, 224 Ark. 558, 275 S.W.2d 455 (1955); State Board of Barber Examiners v. Cloud, 220 Ind. 552, 44 N.E.2d 972 (1942).

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16A Am. Jur. 2d Constitutional Law § 374

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

c. Legislative Power to Determine Reasonableness and Appropriateness of Means

§ 374. Legislative power to determine reasonableness and appropriateness of means of exercise of police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The question of whether legislation is in the public interest is generally for legislative determination.¹ The discretion of the legislature in the exercise of the police power is very broad,² both in determining what the interests of the public require and in deciding what measures and means are reasonably necessary for the protection of those interests.³ Legislatures are empowered to pass laws to meet the pressing social needs of the times, even if those laws seem to others ill-advised or indeed later prove to be failures.⁴ They may experiment and explore means through which to advance public policy so long as there is a reasonable basis to support the legislation.⁵ Thus, in attempting to remedy a perceived evil, the legislature is not limited to choosing the single, most effective remedy against the problem but rather may decide to attack it along several fronts simultaneously.⁶

So long as an act of the legislature does not infringe upon the inherent rights of life, liberty, and property, either directly or through some limitation upon the means of living or some material right essential to the enjoyment of life, a legislative determination on the necessity for a police power regulation, and the method to be employed, is conclusive upon the courts.⁷ On the other hand, a mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not of itself bring the law within the police power of a state.⁸ Accordingly, a declaration in a statute as to its purposes does not bind the courts on the issue of whether the means provided were reasonably designed to accomplish those purposes.⁹ A governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by a mere

assertion in the preamble of the legislation.¹⁰ In the exercise of police power, the legislature cannot, by its mere fiat, render an action reasonable that is indisputably unreasonable.¹¹

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Footnotes

- 1 Central Platte Natural Resources Dist. v. City of Fremont, 250 Neb. 252, 549 N.W.2d 112 (1996).
- 2 Brevard County v. Stack, 932 So. 2d 1258 (Fla. 5th DCA 2006); People v. McCarty, 223 Ill. 2d 109, 306 Ill. Dec. 570, 858 N.E.2d 15 (2006).
- 3 Brevard County v. Stack, 932 So. 2d 1258 (Fla. 5th DCA 2006); People v. McCarty, 223 Ill. 2d 109, 306 Ill. Dec. 570, 858 N.E.2d 15 (2006); State v. Bryan, 145 Wash. App. 353, 185 P.3d 1230 (Div. 1 2008).
- 4 Caviglia v. Royal Tours of America, 178 N.J. 460, 842 A.2d 125 (2004).
- 5 Caviglia v. Royal Tours of America, 178 N.J. 460, 842 A.2d 125 (2004).
- 6 Miller v. Rosenberg, 196 Ill. 2d 50, 255 Ill. Dec. 464, 749 N.E.2d 946 (2001).
- 7 §§ 375 to 377.
- 8 New Orleans Campaign For a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002) (city's minimum wage ordinance); Woolf v. Fuller, 87 N.H. 64, 174 A. 193, 94 A.L.R. 1067 (1934); Murray v. La Guardia, 291 N.Y. 320, 52 N.E.2d 884 (1943); MacRae v. City of Fayetteville, 198 N.C. 51, 150 S.E. 810 (1929); Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).
- 9 Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3, 118 A.L.R. 486 (1938).
- 10 Bates v. City of Little Rock, 361 U.S. 516, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960).
- 11 Woolf v. Fuller, 87 N.H. 64, 174 A. 193, 94 A.L.R. 1067 (1934); Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

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16A Am. Jur. 2d Constitutional Law § 375

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

c. Legislative Power to Determine Reasonableness and Appropriateness of Means

§ 375. Judicial challenges to means of exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A legislature's police power is not unlimited, and the validity of any mandate promulgated under it is for judicial determination.¹ Thus, while the legislature may enact laws which impinge on constitutional rights to protect the health, safety, and welfare of society, any restriction is subject to judicial review to protect the constitutional rights of all citizens.² In accordance with the general rule, if the validity of police power legislation is properly raised it is the duty of the judiciary to determine its constitutionality.³ In reviewing the legislature's exercise of the police power, the court must presume that the legislative act in question is valid unless it bears no just relation to the purposes underlying the police power or amounts to a plain and palpable invasion of constitutional rights.⁴ If the act suffers from either infirmity, then the court must invalidate it.⁵

Although the issue of whether or not the police power was properly exercised is a judicial question, courts must accord considerable deference to the judgment of the legislature,⁶ since the determination of what constitutes a public purpose is first and foremost a legislative one.⁷ Courts must accord broad authority to the legislature to classify and delineate the public policy of the state.⁸ Thus, the courts must allow governments wide latitude in creating social and economic legislation.⁹

From its very nature, the police power is a power to be exercised within wide limits of legislative discretion, and if a statute appears to be within the apparent scope of this power the courts will not inquire into its wisdom and policy¹⁰ or whether the best means of achieving the desired result were selected.¹¹ Similarly, the motive of the legislative body in passing a police regulation

is irrelevant to the judicial inquiry.¹² If there is doubt as to whether a statute is enacted for a legitimate police objective or if, conceding the statute's purpose, its exercise goes too far, then the judiciary has a duty to invalidate the particular exercise of the police power.¹³

The courts will not interfere so long as the police power of the state is not arbitrarily or unreasonably exercised¹⁴ and does not contravene any constitutional provision.¹⁵ Courts defer to legislative decisions about when to exercise the police power and typically require only that they be rational.¹⁶ Thus, absent any involvement of a fundamental right or suspect classification, a legislative act is a valid exercise of the police power if the act is rationally related to some legitimate governmental purpose.¹⁷ Before a reviewing court can hold that an exercise of the state's police power is unconstitutional, it must find that the exercise has no substantial relationship to public health, safety, morals, or general welfare.¹⁸

Observation:

Although a federal court will not ordinarily interfere in the exercise of the police power of a state government or question the wisdom and effectiveness of its police power methods, undifferentiated fears of the majority cannot justify the suppression of First Amendment rights.¹⁹

A presumption always favors the validity of a legislative body's action in exercising the police power.²⁰ The legislative body is presumed to have considered the circumstances and conditions under which the subject matter of a police regulation exists, and the courts may look to these factors to the extent that they are matters of judicial notice or may be admitted or shown by clear evidence in the record.²¹ Upon a judicial inquiry into the validity of police power enactments, legislative findings are entitled to great weight, and the legislative remedy will not be struck down unless its invalidity is clearly established.²²

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Footnotes

- 1 [State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 \(2006\).](#)
While the General Assembly may enact laws which impinge on constitutional rights to protect the health, safety, and welfare of society, any restriction is subject to judicial review to protect the constitutional rights of all citizens. [In re J.B., 630 Pa. 408, 107 A.3d 1 \(2014\).](#)
- 2 [In re J.B., 630 Pa. 408, 107 A.3d 1 \(2014\).](#)
- 3 [§ 112.](#)
- 4 [State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 \(2006\).](#)
- 5 [State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 \(2006\).](#)
- 6 [Whittington v. State, 669 N.E.2d 1363 \(Ind. 1996\); Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 170 P.3d 508 \(2007\).](#)
- 7 [Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 170 P.3d 508 \(2007\).](#)
- 8 [State v. Hill, 189 Kan. 403, 369 P.2d 365, 91 A.L.R.2d 750 \(1962\).](#)
- 9 [International Paper Co. v. Town of Jay, 928 F.2d 480, 110 A.L.R. Fed. 867 \(1st Cir. 1991\).](#)

- 10 City of Kansas City v. Jordan, 174 S.W.3d 25 (Mo. Ct. App. W.D. 2005); Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309 (1995); Taghipour v. Jerez, 2001 UT App 139, 26 P.3d 885 (Utah Ct. App. 2001), judgment aff'd, 2002 UT 74, 52 P.3d 1252 (Utah 2002).
- 11 Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309 (1995).
- 12 McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953).
As to the irrelevance of legislative motivation, generally, see §§ 187, 187.
- 13 Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309 (1995).
- 14 Price v. State, 622 N.E.2d 954 (Ind. 1993) (exercise must only be rational); State Dept. of Roads v. Popco, Inc., 247 Neb. 440, 528 N.W.2d 281 (1995).
- 15 State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 29 (1953); Grove Hill Realty Co. v. Ferncliff Cemetery Ass'n, 7 N.Y.2d 403, 198 N.Y.S.2d 287, 165 N.E.2d 858 (1960); State ex rel. Eaton v. Price, 105 Ohio App. 376, 6 Ohio Op. 2d 153, 152 N.E.2d 776 (2d Dist. Montgomery County 1957), aff'd, 168 Ohio St. 123, 5 Ohio Op. 2d 377, 151 N.E.2d 523 (1958), judgment aff'd, 364 U.S. 263, 80 S. Ct. 1463, 4 L. Ed. 2d 1708, 85 Ohio L. Abs. 49 (1960).
- 16 Lacy v. State, 903 N.E.2d 486 (Ind. Ct. App. 2009); State Dept. of Roads v. Popco, Inc., 247 Neb. 440, 528 N.W.2d 281 (1995).
- 17 State Dept. of Roads v. Popco, Inc., 247 Neb. 440, 528 N.W.2d 281 (1995).
- 18 People v. Gorgis, 337 Ill. App. 3d 960, 272 Ill. Dec. 514, 787 N.E.2d 329 (1st Dist. 2003); Obara v. Minnesota Dept. of Health, 758 N.W.2d 873 (Minn. Ct. App. 2008).
- 19 Ad World, Inc. v. Doylestown Tp., 672 F.2d 1136 (3d Cir. 1982) (invalidating and enjoining the enforcement of an ordinance that prohibited the unrequested door-to-door distribution of advertising).
- 20 Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal. 2d 813, 249 P.2d 545 (1952) (rejected on other grounds by, State v. Redman Petroleum Corp., 77 Nev. 163, 360 P.2d 842 (1961)); Varholly v. Sweat, 153 Fla. 571, 15 So. 2d 267 (1943); Defiance Milk Products Co. v. Du Mond, 285 A.D. 337, 136 N.Y.S.2d 619 (3d Dep't 1954), judgment aff'd, 309 N.Y. 537, 132 N.E.2d 829 (1956).
As to the presumption of the constitutionality of legislative acts, generally, see §§ 165 to 170.
- 21 People v. Aguiar, 257 Cal. App. 2d 597, 65 Cal. Rptr. 171 (1st Dist. 1968).
- 22 East New York Sav. Bank v. Hahn, 293 N.Y. 622, 59 N.E.2d 625 (1944), judgment aff'd, 326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A.L.R. 1279 (1945).

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16A Am. Jur. 2d Constitutional Law § 376

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

c. Legislative Power to Determine Reasonableness and Appropriateness of Means

§ 376. Judicial challenges to means of exercise of police power—Issues decidable by court

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A determination by the legislature as to what is a proper exercise of the police power is not final and conclusive but is subject to the supervision of the courts.¹ Thus, it is ultimately a judicial question whether the facts of a particular case warrant the assertion of the power,² whether a measure is reasonable or arbitrary,³ what are subjects of the lawful exercise of the police power,⁴ and whether an act bears any reasonable and substantial relation to the public purpose sought to be accomplished.⁵ Individual hardship is to be weighed by courts against the public advantages of a measure in determining whether a statute is a valid exercise of the police power.⁶

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Footnotes

- ¹ [Meyer v. Nebraska](#), 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923); [State v. Kievman](#), 116 Conn. 458, 165 A. 601, 88 A.L.R. 962 (1933); [Hoff v. State](#), 39 Del. 134, 197 A. 75 (Super. Ct. 1938); [People ex rel. Heydenreich v. Lyons](#), 374 Ill. 557, 30 N.E.2d 46, 132 A.L.R. 511 (1940).
Determination by the legislative department as to what is a proper exercise of the police power does not prevent a review of the question by the courts. [Department of Financial Institutions v. General Finance Corp.](#), 227 Ind. 373, 86 N.E.2d 444, 10 A.L.R.2d 436 (1949).

- 2 Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141, 12 A.L.R. 1121 (1920); Patton v. City of Bellingham, 179 Wash. 566, 38 P.2d 364, 98 A.L.R. 1076 (1934) (abrogated on other grounds by, Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019)).
- 3 Lehigh Valley R. Co. v. Board of Public Utility Com'rs, 278 U.S. 24, 49 S. Ct. 69, 73 L. Ed. 161, 62 A.L.R. 805 (1928); State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 254 P.2d 29 (1953); Blauvelt v. Beck, 162 Neb. 576, 76 N.W.2d 738 (1956); Direct Plumbing Supply Co. v. City of Dayton, 138 Ohio St. 540, 21 Ohio Op. 422, 38 N.E.2d 70, 137 A.L.R. 1058 (1941); Porter v. City of Paris, 184 Tenn. 555, 201 S.W.2d 688 (1947).
- 4 State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394 (1936); People v. Belcastro, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223 (1934); MacRae v. City of Fayetteville, 198 N.C. 51, 150 S.E. 810 (1929).
- 5 Joseph Triner Corporation v. McNeil, 363 Ill. 559, 2 N.E.2d 929, 104 A.L.R. 1435 (1936), *aff'd*, 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936); State Board of Barber Examiners v. Cloud, 220 Ind. 552, 44 N.E.2d 972 (1942); People v. Victor, 287 Mich. 506, 283 N.W. 666, 124 A.L.R. 316 (1939).
- 6 Smith v. Smith, 126 S.W.3d 660 (Tex. App. Houston 14th Dist. 2004).

End of Document

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16A Am. Jur. 2d Constitutional Law § 377

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

2. Requirement That Means Be Reasonable and Appropriate

c. Legislative Power to Determine Reasonableness and Appropriateness of Means

§ 377. Judicial challenges to means of exercise of police power—Constitutional standards

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

Although the legislature may, under its police power, limit the constitutional rights of personal liberty and property by enacting laws to protect public health, safety, or welfare, any such laws are subject to judicial review and constitutional analysis.¹ The general factors considered in determining the constitutionality of police power measures are no different from those that have relevance to the determination of the constitutionality of other types of legislation.² However, there are certain specific principles that are of special significance in relation to exercises of the police power. Thus, in order to sustain legislation under the police power, the courts must be able to see that its operation tends to prevent some offense or evil or to preserve public health, morals, safety, or welfare.³ In legislating for the general health, safety, and welfare of the people, certain constraints on individual freedom have traditionally been imposed by the state, and it is not the proper function of the courts to substitute their judgment for that of the legislature with respect to the necessity of these constraints.⁴ Only in cases where the legislature exceeds its powers⁵ will the courts interfere or set up their judgment against that of the legislature.⁶ Thus, it is not the function of the United States Supreme Court, under the authority of the 14th Amendment, to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of their authority in enacting and enforcing arbitrary laws that have no reasonable relation to the achievement of lawful purposes.⁷ Likewise, in accordance with the general rule that legislation cannot be invalidated by the courts merely because it may conflict with notions of natural rights⁸ or social justice,⁹ police power regulations may not be invalidated merely because they are adjudged to be contrary to natural justice and equity.¹⁰ In fact, a statute is not to be invalidated by the judiciary if the challenged law does not contravene some significant constitutional or

inherent rights of individuals, the classification on which it is based is reasonable, it is within the scope of the police powers of the state, and it is appropriately related to the proper purpose of that police power.¹¹

Courts are authorized to declare a statute unconstitutional if it conflicts with the constitutional rights of the individual and is not an appropriate means to promote the comfort, safety, or welfare of society.¹² When police power statutes are challenged as an invasion of fundamental rights and liberties, the courts must determine whether the exercise of power is genuinely necessary for the public good.¹³

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Footnotes

- 1 [Nixon v. Com.](#), 576 Pa. 385, 839 A.2d 277 (2003).
- 2 As to the determination of the constitutionality of legislation, generally, see §§ 108 to 211.
- 3 [Pitney v. State of Washington](#), 240 U.S. 387, 36 S. Ct. 385, 60 L. Ed. 703 (1916); [Tanner v. Little](#), 240 U.S. 369, 36 S. Ct. 379, 60 L. Ed. 691 (1916); [Commonwealth for Use and Ben. of City of Wilmore v. McCray](#), 250 Ky. 182, 61 S.W.2d 1043 (1933); [State v. Packer Corporation](#), 77 Utah 500, 297 P. 1013 (1931).
- 4 [State v. Clinkenbeard](#), 130 Wash. App. 552, 123 P.3d 872, 203 Ed. Law Rep. 850 (Div. 3 2005).
- 5 [Graves v. State of Minn.](#), 272 U.S. 425, 47 S. Ct. 122, 71 L. Ed. 331 (1926); [Serve Yourself Gasoline Stations Ass'n v. Brock](#), 39 Cal. 2d 813, 249 P.2d 545 (1952) (rejected on other grounds by, [State v. Redman Petroleum Corp.](#), 77 Nev. 163, 360 P.2d 842 (1961)); [State v. Erle](#), 210 Iowa 974, 232 N.W. 279, 72 A.L.R. 137 (1930); [Commonwealth for Use and Ben. of City of Wilmore v. McCray](#), 250 Ky. 182, 61 S.W.2d 1043 (1933); [Cosmopolitan Life Ins. Co. v. Northington](#), 201 Tenn. 541, 300 S.W.2d 911 (1957); [State v. Packer Corporation](#), 77 Utah 500, 297 P. 1013 (1931).
- 6 [State v. Erle](#), 210 Iowa 974, 232 N.W. 279, 72 A.L.R. 137 (1930); [Commonwealth for Use and Ben. of City of Wilmore v. McCray](#), 250 Ky. 182, 61 S.W.2d 1043 (1933); [City of Chattanooga v. Fanburg](#), 196 Tenn. 226, 265 S.W.2d 15, 42 A.L.R.2d 1200 (1954); [State v. Packer Corporation](#), 77 Utah 500, 297 P. 1013 (1931).
- 7 [Jones v. City of Portland](#), 245 U.S. 217, 38 S. Ct. 112, 62 L. Ed. 252 (1917); [Tanner v. Little](#), 240 U.S. 369, 36 S. Ct. 379, 60 L. Ed. 691 (1916).
- 8 § 183.
- 9 § 185.
- 10 [People v. Chicago, M. & St. P. Ry. Co.](#), 306 Ill. 486, 138 N.E. 155, 28 A.L.R. 610 (1923).
- 11 [Matter of Marriage of Soden](#), 251 Kan. 225, 834 P.2d 358 (1992).
- 12 [Napleton v. Village of Hinsdale](#), 229 Ill. 2d 296, 322 Ill. Dec. 548, 891 N.E.2d 839 (2008) (holding that the complaint failed to state a claim for a substantive due process violation under the rational basis test, in a challenge to a zoning ordinance).
- 13 [Moore v. Mobile Infirmary Ass'n](#), 592 So. 2d 156 (Ala. 1991) (rejected on other grounds by, [Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.](#), 265 Neb. 918, 663 N.W.2d 43 (2003)); [Mongogna v. O'Dwyer](#), 204 La. 1030, 16 So. 2d 829, 152 A.L.R. 162 (1943); [City of Guthrie v. Pike & Long](#), 1952 OK 158, 206 Okla. 307, 243 P.2d 697 (1952).

End of Document

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16A Am. Jur. 2d Constitutional Law § 378

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

a. General Principles

§ 378. Constitutional limitations on exercise of police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

One of the most difficult problems in constitutional law is that of determining the constitutional limitations upon the exercise of the police power.¹ The proper function of the police power is to balance the possession and enjoyment of individual rights with reasonable regulations and restraints that are essential to the preservation of the health, safety, or welfare of the community.² When the individual rights affected by the exercise of the state's police power are not fundamental, strict scrutiny requiring a compelling state interest does not apply. Rather, the state need only demonstrate a rational basis for the regulation.³

The authority of the state to regulate is limited, and the state may not exercise its police power in a manner repugnant to fundamental constitutional rights guaranteed to all citizens.⁴ Thus, while the legislature is vested with a wide discretion, it cannot, under the guise of the police power, enact unequal, unreasonable, or oppressive legislation or that which violates the Constitution.⁵ However, there is no express provision in the Federal Constitution stating that a legislative enactment must be within the police power of government, or limiting a state's legislative authority to proper exercises of the police power or providing that legislation constituting an abuse of the police power is void.⁶ The states, in forming the Union, reserved a substantial portion of the nation's primary sovereignty, and, because of this, constitutional restrictions on the states' police power should not be lightly inferred.⁷ A state is free as a matter of its own law to impose greater restrictions on police activity than those required by federal constitutional standards.⁸ However, a state may not impose these heightened restrictions when the United States Supreme Court specifically refrains from imposing them.⁹

The line separating the legitimate use of the police power from the illegitimate is often incapable of precise delimitation as it varies from circumstance to circumstance.¹⁰

The state's police power does not justify an interference with constitutional rights that is entirely out of proportion to any public benefit.¹¹ Generally, the "unconstitutional conditions doctrine" holds that the government may not grant a benefit conditioned on a surrender of constitutional rights, even though the government could have validly withheld the benefit completely.¹²

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Footnotes

- 1 [Zorach v. Clauson](#), 303 N.Y. 161, 100 N.E.2d 463 (1951), judgment aff'd, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952) (recognizing the delicate accommodation between First Amendment freedoms and the exercise of state authority).
- 2 [State v. Curley-Egan](#), 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 (2006).
- 3 [Wiser v. State, Dept. of Commerce](#), 2006 MT 20, 331 Mont. 28, 129 P.3d 133 (2006).
- 4 [President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Com'n](#), 13 S.W.3d 635 (Mo. 2000); [State v. Vawter](#), 136 N.J. 56, 642 A.2d 349 (1994).
- 5 [Hodes & Nauser, MDs, P.A. v. Schmidt](#), 309 Kan. 610, 440 P.3d 461 (2019).
- 6 [VNA Hospice of Maryland v. Department of Health and Mental Hygiene](#), 406 Md. 584, 961 A.2d 557 (2008) (stating, further, that there was also no express provision in the state constitution).
- 7 [Rocky Mountain Farmers Union v. Corey](#), 913 F.3d 940 (9th Cir. 2019).
- 8 [Arkansas v. Sullivan](#), 532 U.S. 769, 121 S. Ct. 1876, 149 L. Ed. 2d 994 (2001).
- 9 [Arkansas v. Sullivan](#), 532 U.S. 769, 121 S. Ct. 1876, 149 L. Ed. 2d 994 (2001).
- 10 [Gerijo, Inc. v. Fairfield](#), 70 Ohio St. 3d 223, 1994-Ohio-432, 638 N.E.2d 533 (1994) (holding modified on other grounds by, [Goldberg Cos., Inc. v. Richmond Hts. City Council](#), 81 Ohio St. 3d 207, 1998-Ohio-207, 690 N.E.2d 510 (1998)).
As to the difficulty of defining police power, see § 333.
As to limitations on police power, generally, see § 368.
- 11 [City of Baton Rouge v. Williams](#), 661 So. 2d 445 (La. 1995).
- 12 [Matter of Plan for Orderly Withdrawal from New Jersey of Twin City Fire Ins. Co.](#), 129 N.J. 389, 609 A.2d 1248 (1992).

End of Document

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16A Am. Jur. 2d Constitutional Law § 379

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

a. General Principles

§ 379. Applicability of constitutional provisions to limit exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  4.4(2), 21(2)

The structure and limitations of federalism allow states great latitude under their police powers to legislate concerning the protection of the lives, limbs, health, comfort, and quiet of all persons.¹ However, the police power is constrained by the limits under the State and Federal Constitutions that apply to all governmental actions.² A constitutional right cannot be abridged by legislation under the guise of a police power regulation.³ By virtue of the Supremacy Clause⁴ of the Federal Constitution, state action under its police power must give way when in conflict with the Federal Constitution or federal law.⁵

If a state statute violates the Federal Constitution, the reserved powers of the state cannot validate it.⁶ However, the courts may not lightly set aside, as an invasion of rights guaranteed by the constitution, a statute, ordinance, or regulation that was enacted to further the common welfare.⁷ Thus, the United States Supreme Court does not sit as a super-legislature to weigh the wisdom of legislation or to decide whether the policy that it expresses offends the public welfare.⁸ The Supreme Court has long since abandoned the use of the Due Process Clause to strike down laws which it thought were unreasonable—that is, unwise or incompatible with some particular economic or social philosophy.⁹

A state may not exercise its police power in such a way as to violate a positive state constitutional mandate¹⁰ or enact legislation that renders state constitutional provisions nugatory.¹¹ State constitutional rights do not expand the police power but restrict

it.¹² Whether an exercise of a state's police power places a prohibited material burden on a core value embodied in the individual liberties protected by a state constitution looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue.¹³

A police power regulation, obviously intended as such, and not operating unreasonably beyond its purpose is not rendered invalid by the fact that it may incidentally affect the exercise of some constitutional right.¹⁴ Thus, although almost every exercise of the police power will necessarily infringe upon constitutionally protected rights, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals, or general welfare, and if it is not unreasonable or arbitrary.¹⁵

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Footnotes

- 1 [Gonzales v. Oregon](#), 546 U.S. 243, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006).
- 2 [Bibb v. Navajo Freight Lines, Inc.](#), 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959); [Day-Brite Lighting Inc. v. State of Mo.](#), 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952); [Carter v. State](#), 255 Ark. 225, 500 S.W.2d 368 (1973); [People v. Blue](#), 190 Colo. 95, 544 P.2d 385 (1975); [People v. Wilson](#), 4 Ill. App. 3d 766, 281 N.E.2d 740 (1st Dist. 1972); [Satterfield v. Crown Cork & Seal Co., Inc.](#), 268 S.W.3d 190 (Tex. App. Austin 2008).
The provision of the Kentucky Constitution denying absolute and arbitrary power over the lives, liberty, and property of freemen envisions that the state, in the exercise of its police power, may not unreasonably invade and violate private rights guaranteed under the Federal or State Constitution. [Kentucky Cent. Life Ins. Co. v. Stephens](#), 897 S.W.2d 583 (Ky. 1995).
- 3 [Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas](#), 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (1935); [Union Carbide & Carbon Corp. v. White River Distributors](#), 224 Ark. 558, 275 S.W.2d 455 (1955); [Graff v. Priest](#), 356 Mo. 401, 201 S.W.2d 945 (1947); [McCoy v. Town of York](#), 193 S.C. 390, 8 S.E.2d 905 (1940).
- 4 U.S. Const. Art. VI, cl. 2.
- 5 [Bibb v. Navajo Freight Lines, Inc.](#), 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959); [Morris v. Jones](#), 329 U.S. 545, 67 S. Ct. 451, 91 L. Ed. 488, 168 A.L.R. 656 (1947).
The police power is subject to the Federal Constitution, which is the supreme law of the land. [Connor v. Chanhassen Tp.](#), 249 Minn. 205, 81 N.W.2d 789 (1957).
- 6 [Morgan v. Com. of Va.](#), 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A.L.R. 574 (1946).
- 7 [Ule v. State](#), 208 Ind. 255, 194 N.E. 140, 101 A.L.R. 903 (1935); [Bus Depot Holding Corporation v. Valentine](#), 288 N.Y. 115, 41 N.E.2d 913 (1942).
- 8 [Day-Brite Lighting Inc. v. State of Mo.](#), 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952).
- 9 [Ferguson v. Skrupa](#), 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963).
- 10 [Quilici v. Village of Morton Grove](#), 695 F.2d 261 (7th Cir. 1982) (holding that a gun control ordinance did not violate the state constitution).
- 11 [Trinen v. City and County of Denver](#), 53 P.3d 754 (Colo. App. 2002).
- 12 [State v. Hamdan](#), 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 (2003).
- 13 [City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment](#), 744 N.E.2d 443 (Ind. 2001).
- 14 [Alabama State Federation of Labor v. McAdory](#), 246 Ala. 1, 18 So. 2d 810 (1944); [State v. Union Oil Co. of Me.](#), 151 Me. 438, 120 A.2d 708 (1956); [State v. Sullivan](#), 245 Minn. 103, 71 N.W.2d 895, 56 A.L.R.2d 871 (1955).
- 15 [Benjamin v. City of Columbus](#), 167 Ohio St. 103, 4 Ohio Op. 2d 113, 146 N.E.2d 854 (1957).

16A Am. Jur. 2d Constitutional Law § 380

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

b. Interference with Liberties and Contract Rights

§ 380. Interference with private or personal rights and liberties by exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The use of the police power must be within the legitimate concern of the state and not otherwise reserved to the individual.¹ The method of controlling the private right must be reasonably related to a legitimate government end² and must not interfere with private rights beyond the necessities of the circumstances.³ Thus, in regard to social and economic regulation, the legislature may in the exercise of what is usually called its police power, regulate or restrict the freedom of the individual to act, when the regulation or restraint is essential to the protection of the public safety, health, or morals, even though the power is itself subject to the restraints imposed by constitutions which the whole people have adopted and approved as the supreme law of the land.⁴ However, the legislature may not, under the cloak of the power, exercise a power forbidden by constitutions or take away rights and privileges expressly guaranteed by the Constitution.⁵

In determining the constitutional limits on the state's exercise of its police power where private rights are involved, the public benefit to be served must be weighed against those rights to determine the reasonableness of the state's action.⁶ If the restriction of a private right is oppressive, while the public welfare is enhanced only to a slight degree, then the offending statute is void as an invalid exercise of the police power.⁷ When the state's police power is invoked in a statutory mandate, the law should not be declared unconstitutional merely because it restricts some of the rights secured to individuals by the Constitution,⁸ but only if the restrictions imposed are unreasonable.⁹ The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and liberty of the individual citizen¹⁰ by legislative action that is arbitrary or without reasonable relation to

some purpose within the competency of the state to effect,¹¹ and thus, violate rights that are guaranteed under the Federal or State Constitution.¹² A police power enactment, because of retroactive application or otherwise, may validly diminish in value or even totally destroy an individual's right, whether in property as such or arising out of contract, so long as the public interest to be promoted sufficiently outweighs in importance the private right which is impaired.¹³

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Footnotes

- 1 C and R Stacy, LLC v. County of Chisago, 742 N.W.2d 447 (Minn. Ct. App. 2007).
- 2 C and R Stacy, LLC v. County of Chisago, 742 N.W.2d 447 (Minn. Ct. App. 2007).
- 3 Maxwell v. City of Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682 (1924); Chicago Park Dist. v. Canfield, 370 Ill. 447, 19 N.E.2d 376, 121 A.L.R. 557 (1939); Kelleys Island v. Joyce, 146 Ohio App. 3d 92, 765 N.E.2d 387 (6th Dist. Erie County 2001).
- 4 Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007), opinion extended on other grounds after remand, 2008 WL 3999843 (Md. Cir. Ct. 2008) and (abrogated on other grounds by, Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)).
- 5 Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007), opinion extended on other grounds after remand, 2008 WL 3999843 (Md. Cir. Ct. 2008) and (abrogated on other grounds by, Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)).
- 6 Kennedy v. Town of Sunapee, 147 N.H. 79, 784 A.2d 685 (2001).
- 7 Kennedy v. Town of Sunapee, 147 N.H. 79, 784 A.2d 685 (2001).
- 8 Kennedy v. Town of Sunapee, 147 N.H. 79, 784 A.2d 685 (2001).
- 9 Kennedy v. Town of Sunapee, 147 N.H. 79, 784 A.2d 685 (2001).
- 10 People v. Linde, 341 Ill. 269, 173 N.E. 361, 72 A.L.R. 997 (1930); Bond Bros. v. Louisville and Jefferson County Metropolitan Sewer Dist., 307 Ky. 689, 211 S.W.2d 867 (1948); Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938); Ex parte Tomlinson, 54 Okla. Crim. 367, 22 P.2d 398 (1933).
- 11 Teche Lines, Inc., v. Danforth, 195 Miss. 226, 12 So. 2d 784 (1943); Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W.2d 23 (1938); City of Reno v. Second Judicial District Court in and for Washoe County, 59 Nev. 416, 95 P.2d 994, 125 A.L.R. 948 (1939); Sowma v. Parker, 112 Vt. 241, 22 A.2d 513 (1941).
- 12 Department of Financial Institutions v. General Finance Corp., 227 Ind. 373, 86 N.E.2d 444, 10 A.L.R.2d 436 (1949); Hertz Drivursel Stations v. Siggins, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948).
As to constitutionally protected liberty, generally, see §§ 607 to 627.
- 13 Brown v. Township of Old Bridge, 319 N.J. Super. 476, 725 A.2d 1154 (App. Div. 1999).

End of Document

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16A Am. Jur. 2d Constitutional Law § 381

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

b. Interference with Liberties and Contract Rights

§ 381. Interference with private or personal rights and liberties by exercise of police power—Regulating innocent acts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The legislature, in enacting a police power regulation, may include within the purview of the statute acts that are innocent in themselves if the inclusion is necessary in order to make the regulation effective.¹ On the other hand, the legislature, in the exercise of its police power, may not validly make it a crime to do something that is innocent in itself merely because it is sometimes done improperly, attended by improper motives, or done as part of an illegal scheme.² An act that has no tendency to affect the public in connection with health, safety, morals, or general welfare and which is entirely innocent in character is not within the police power.³ Furthermore, a person may not be deprived of liberty for doing an act that is not and cannot be made unlawful.⁴

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Footnotes

- ¹ [State v. Kartus](#), 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336 (1935); [L. Maxcy, Inc., v. Mayo](#), 103 Fla. 552, 139 So. 121 (1931).
- A state can prohibit entirely the use of particular drugs for which there is both a lawful and an unlawful market and may exercise broad police powers in regulating the administration of drugs by the health professions. [Whalen v. Roe](#), 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

- 2 [People v. Bunis](#), 9 N.Y.2d 1, 210 N.Y.S.2d 505, 172 N.E.2d 273 (1961).
- 3 [Delmonico v. State](#), 155 So. 2d 368 (Fla. 1963) (invalidating a statute prohibiting the possession of any spearfishing equipment in a particular part of a named county); [City of Detroit v. Bowden](#), 6 Mich. App. 514, 149 N.W.2d 771 (1967) (invalidating a regulation making it unlawful for a known prostitute or panderer, defined as one with a prior conviction for such an offense, to repeatedly stop or attempt to stop any pedestrian or motor vehicle by hailing, whistling, or gesturing in public).
- 4 [Ex parte Dees](#), 46 Cal. App. 656, 189 P. 1050 (1st Dist. 1920).

End of Document

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16A Am. Jur. 2d Constitutional Law § 382

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

b. Interference with Liberties and Contract Rights

§ 382. Interference with freedom to contract by exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The rule that liberty of contract is constitutionally protected¹ and that governmental power to limit this liberty must rest on some reasonable basis² applies with full force to police power restrictions on that freedom.³ However, the right of contract is subject to certain limitations that the state may lawfully impose in the exercise of its police power⁴ for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction.⁵ Thus, the restrictions of the contract clause, under which the government may not substantially impair contractual rights, must be reconciled with the essential attributes of sovereign power that are necessarily reserved by the states to safeguard their citizens.⁶

The constitutional guaranty of the freedom to contract⁷ does not deny the legislative branch of the government authority to impose those reasonable safeguards which, in its judgment, are necessary to the public welfare⁸ in order to protect an overriding public interest.⁹ The Contracts Clause does not trump the police power of a state to protect the general welfare of its citizens, a power which is paramount to any rights under contracts between individuals.¹⁰ A statute restricting the right to contract will not be invalidated if the measure was enacted to protect the public's health, safety, or welfare.¹¹

The liberty to contract is constitutionally protected against arbitrary restrictions but not against prohibitions established in the interest of the community.¹² If a contract is one that the state has the right to prohibit through the legitimate exercise of its

police power, then the state is not barred from doing so by the 14th Amendment.¹³ Where freedom of contract and declared public policy are in conflict, the former necessarily must yield to the latter.¹⁴ Liberty of contract is not necessarily violated by restrictions imposed under the police power, even though a consequence of the restriction is to render related, otherwise lawful contracts ineffective.¹⁵

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Footnotes

- 1 § 640.
- 2 § 642.
- 3 *Gideon-Anderson Lumber Co. v. Hayes*, 348 Mo. 1085, 156 S.W.2d 898 (1941).
As to the constitutional prohibition against impairment of contracts as limiting the police power, see § 393.
- 4 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937); *American Federation of Labor v. American Sash & Door Co.*, 67 Ariz. 20, 189 P.2d 912 (1948), judgment aff'd, 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A.L.R.2d 481 (1949); *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949); *Superior Oil Co. v. Foote*, 214 Miss. 857, 59 So. 2d 85, 37 A.L.R.2d 415 (1952), error overruled on other grounds, 214 Miss. 857, 59 So. 2d 844 (1952).
A statute limiting the amount of hazardous waste that may be disposed of at any affected facility in any one-year period does not violate the Contracts Clause. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991), decision rev'd on other grounds, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992).
- 5 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330 (1937); *American Federation of Labor v. American Sash & Door Co.*, 67 Ariz. 20, 189 P.2d 912 (1948), judgment aff'd, 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A.L.R.2d 481 (1949); *Twentieth Century Associates v. Waldman*, 294 N.Y. 571, 63 N.E.2d 177, 162 A.L.R. 197 (1945); *Porter v. City of Oberlin*, 1 Ohio St. 2d 143, 30 Ohio Op. 2d 491, 205 N.E.2d 363 (1965); *State v. Nuss*, 79 S.D. 522, 114 N.W.2d 633 (1962).
- 6 *Linton by Arnold v. Commissioner of Health and Environment, State of Tenn.*, 65 F.3d 508, 1995 FED App. 0278P (6th Cir. 1995).
- 7 U.S. Const. Art. I, § 10, cl. 1.
- 8 *Brown v. Township of Old Bridge*, 319 N.J. Super. 476, 725 A.2d 1154 (App. Div. 1999).
- 9 *South Carolina Dept. of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 547 S.E.2d 881 (Ct. App. 2001).
- 10 *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 213 Ed. Law Rep. 83 (2d Cir. 2006).
- 11 *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506 (Fla. 1st DCA 2006) (disapproved of on other grounds by, *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008)).
- 12 *Brown v. Township of Old Bridge*, 319 N.J. Super. 476, 725 A.2d 1154 (App. Div. 1999).
- 13 *Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949); *N.H. Lyons & Co. v. Corsi*, 3 N.Y.2d 60, 163 N.Y.S.2d 677, 143 N.E.2d 392 (1957).
- 14 *Calef v. West*, 252 Mich. App. 443, 652 N.W.2d 496 (2002).
- 15 *National City Bank of New York v. Del Sordo*, 16 N.J. 530, 109 A.2d 631 (1954).

End of Document

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16A Am. Jur. 2d Constitutional Law § 383

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

c. Interference with Property Rights

§ 383. Interference with constitutional right to own and use property by exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The government may regulate the use of private property through its police powers.¹ Thus, all citizens hold their property subject to a reasonable exercise of police power.² An individual owner's privilege to use such individual's property freely is always subject to new burdens and restrictions that may be imposed by government when the public welfare demands.³ The legislature may exercise its police power to regulate the use and enjoyment of property when the free exercise of that use is detrimental to the public interest.⁴

The inherent police power of the sovereign rests upon the fundamental principle that all property is owned subject to the limitation that its use may be regulated for the safety, health, morals, or general welfare of the community in which it is located.⁵ The function of police power promotes the health, welfare, and safety of the people by regulating all threats harmful to the public interest,⁶ and the legislature is afforded wide discretion to exercise this power.⁷

However, the lawmaking authorities may not, under the guise of police power, impose restrictions upon the use of private property that are unnecessary and unreasonable.⁸ The free use of property can be invaded by an exercise of the police power only when the restriction bears a substantial relationship to the public health, morals, or safety.⁹ A police power regulation of private property must be reasonably related to a substantial public purpose.¹⁰ The enjoyment of private property cannot be

interfered with or limited arbitrarily by government regulation.¹¹ A state constitutional provision stating that private property will ever be held inviolate but subservient to the public welfare requires that legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property.¹²

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Footnotes

- 1 Village of Blodgett v. Rhymer, 279 S.W.3d 242 (Mo. Ct. App. S.D. 2009).
- 2 State ex rel. Koster v. Olive, 282 S.W.3d 842 (Mo. 2009).
Constitutional rights pertaining to private property are subordinate to the police power. *McIlvaine v. City of St. Charles*, 2015 IL App (2d) 141183, 396 Ill. Dec. 913, 40 N.E.3d 798 (App. Ct. 2d Dist. 2015).
- 3 Peoples Program for Endangered Species v. Sexton, 323 S.C. 526, 476 S.E.2d 477 (1996).
- 4 Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, 148 P.3d 842 (Okla. 2006), as corrected, (Nov. 6, 2006).
- 5 Red Dog Saloon v. Sedgwick County Bd. of Com'rs, 29 Kan. App. 2d 928, 33 P.3d 869 (2001); Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, 148 P.3d 842 (Okla. 2006), as corrected, (Nov. 6, 2006).
Restricting property rights guaranteed by the state constitution is permissible if the restrictions are reasonably necessary to secure the health, safety, good order, and general welfare. *Harris v. Martin Regency, Ltd.*, 576 So. 2d 1294 (Fla. 1991).
- 6 State ex rel. Koster v. Olive, 282 S.W.3d 842 (Mo. 2009).
- 7 Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987); State ex rel. Koster v. Olive, 282 S.W.3d 842 (Mo. 2009); First Covenant Church of Seattle v. City of Seattle, 120 Wash. 2d 203, 840 P.2d 174 (1992).
- 8 Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944); Charles v. Diamond, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977); Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956).
- 9 State ex rel. Pizza v. Rezcallah, 84 Ohio St. 3d 116, 1998-Ohio-313, 702 N.E.2d 81 (1998).
- 10 Gibbons v. Historic Dist. Com'n of Town of Fairfield, 285 Conn. 755, 941 A.2d 917 (2008).
- 11 State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A.L.R. 654 (1928); Union Carbide & Carbon Corp. v. White River Distributors, 224 Ark. 558, 275 S.W.2d 455 (1955); Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782 (1925); Bond Bros. v. Louisville and Jefferson County Metropolitan Sewer Dist., 307 Ky. 689, 211 S.W.2d 867 (1948); Charles v. Diamond, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977).
- 12 Groch v. Gen. Motors Corp., 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E.2d 377 (2008).

End of Document

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16A Am. Jur. 2d Constitutional Law § 384

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

c. Interference with Property Rights

§ 384. Interference with constitutional right to own and use property by exercise of police power—Appropriate regulation of right to use property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States ⚙️ 21\(2\)](#)

A.L.R. Library

[Constitutionality of statutes providing for destruction of gambling devices, 14 A.L.R.3d 366](#)

[Validity of statute or ordinance providing for destruction of dogs, 56 A.L.R.2d 1024](#)

[Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73](#)

[Seeking of variance as prerequisite for ripeness of challenge to zoning ordinance under due process clause of Federal Constitution's Fifth and Fourteenth Amendments—post-Williamson cases, 111 A.L.R. Fed. 483](#)

Forms

Forms relating to actions to permit projects on marshland, see Am. Jur. Pleading and Practice Forms, Waters [\[Westlaw®\(r\) Search Query\]](#)

The fact that rights in property are protected by constitutional guarantees does not mean that their use cannot be regulated under the police power for the general welfare.¹ A police power regulation is not necessarily invalid merely because the highest and best use of the property has been precluded.² The state, in the exercise of its police power, may frustrate even expectations that rise to the level of a "property interest," subject to constitutional protection.³ The fact that a party's property interest was in the first instance derived from a contract with the state does not, and could not, thereby exempt that property interest from the proper exercise of the state's police power.⁴ Considerations of financial loss or of so-called "vested rights" in private property are insufficient to outweigh the necessity for legitimate exercise of the police power.⁵ The state's inherent sovereign power includes the so-called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, or general well-being of the people.⁶ However, the bundle of venerable rights associated with property may be strongly protected by a state constitution and must be trod upon lightly, no matter how great the weight of other interests.⁷

The enforcement of legislation that adversely affects property rights is valid when the public interest being served clearly outweighs the impairment.⁸ This rule is based upon the principle that all property within the jurisdiction of a state, however absolute the owner's title may be, is held on the implied condition or obligation that its use not be injurious to the equal right of others to the use and benefit of their own property.⁹ In determining whether a governmental action is unduly oppressive so as to exceed the police power, the court must consider the economic impact of the regulation on the property holder and whether the governmental interference with property could be characterized as a physical intrusion.¹⁰

Observation:

The traditional analysis of reasonableness and necessity focuses on such issues as whether an emergency exists justifying the impairment, whether the law was enacted to protect a basic societal interest rather than as a favor to a group, whether the law is narrowly tailored to the emergency at hand, whether the imposed conditions are reasonable, and whether the law is limited to the duration of the emergency.¹¹

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Footnotes

- ¹ [Sharrow v. City of Dania](#), 83 So. 2d 274 (Fla. 1955).
Private property is held subject to the general police power of the state and may be regulated pursuant to that power. [State v. Anderson](#), 57 Ohio St. 3d 168, 566 N.E.2d 1224 (1991).
Property rights are subject to the reasonable exercise of the state's police power. [Union Pacific Resources Co. v. Texaco, Inc.](#), 882 P.2d 212 (Wyo. 1994).

2 State ex rel. Nixon v. Jewell, 70 S.W.3d 465 (Mo. Ct. App. E.D. 2001).
3 Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984).
As to the limits, under the federal and state constitutions' takings clauses, on police power regulation of
private property, see §§ 395, 396.
4 Belle Isle Grill Corp. v. City of Detroit, 256 Mich. App. 463, 666 N.W.2d 271 (2003).
5 Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950); People v. K. Sakai Co., 56 Cal. App.
3d 531, 128 Cal. Rptr. 536 (1st Dist. 1976).
6 20th Century Ins. Co. v. Superior Court, 90 Cal. App. 4th 1247, 109 Cal. Rptr. 2d 611 (2d Dist. 2001).
7 Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
8 Chase Manhattan Bank v. Josephson, 135 N.J. 209, 638 A.2d 1301 (1994).
9 Anthony v. Veatch., 340 U.S. 923, 71 S. Ct. 499, 95 L. Ed. 667 (1951); Nebbia v. People of New York, 291
U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); Clark v. Kreidt, 145 Fla. 1, 199 So. 333
(1940); National Steel Service Center, Inc. v. Gibbons, 319 N.W.2d 269, 31 A.L.R.4th 650 (Iowa 1982).
10 Eagle Environmental II, L.P. v. Com., Dept. of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005).
11 Ken Moorhead Oil Co., Inc. v. Federated Mut. Ins. Co., 323 S.C. 532, 476 S.E.2d 481 (1996).

End of Document

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16A Am. Jur. 2d Constitutional Law § 385

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

c. Interference with Property Rights

§ 385. Zoning regulations as affecting rights in realty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The owner of real property may be restricted in the use and management of it by zoning rules and regulations that conserve the public health and safety,¹ and police power legislation may provide that a particular use of land is unlawful or constitutes a nuisance even though the use had previously been lawful.² The zoning power is not unlimited, however, as the power to zone derives from the police power of the state, and zoning ordinances must therefore bear a reasonable relation to goals properly pursued by the state through its police power.³

State statutes requiring oil and gas developers to pay the surface owners for actual damages caused by drilling operations even if the mineral estates were separated from the surface estates before enactment of the statutes are not invalid exercises of the police power in that such statutes benefit the surface owners where they also benefit the public interest by furthering the purpose of protecting the agricultural uses of the land.⁴

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- ¹ [Edgar A. Levy Leasing Co. v. Siegel](#), 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922); [Sprenger, Grubb & Associates, Inc. v. City of Hailey](#), 127 Idaho 576, 903 P.2d 741 (1995); [Presnell v. Leslie](#), 3 N.Y.2d 384,

165 N.Y.S.2d 488, 144 N.E.2d 381 (1957) (involving the refusal of a permit for the construction of a 44-foot antenna tower for an amateur radio station in a residential zone).

2 *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 27 Ohio Op. 2d 388, 200 N.E.2d 328 (1964) (holding that where a valid statute has prohibited a particular use of property or has provided that it is a nuisance, the owner no longer has a lawful or legitimate right to so use the land).

3 *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995).

4 *Murphy v. Amoco Production Co.*, 729 F.2d 552 (8th Cir. 1984).

End of Document

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16A Am. Jur. 2d Constitutional Law § 386

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

c. Interference with Property Rights

§ 386. Zoning regulations as affecting rights in realty —Aesthetic considerations as justifying regulations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Validity and Construction of Restrictive Covenant Prohibiting or Governing Outside Storage or Parking of House Trailers, Motor Homes, Campers, Vans, and Like, in Residential Neighborhoods, 81 A.L.R.6th 469](#)

[Validity and construction of zoning regulations relating to illuminated signs, 30 A.L.R.5th 549](#)

[Validity of zoning laws setting minimum lot size requirements, 1 A.L.R.5th 622](#)

[Validity and construction of zoning laws setting minimum requirements for floorspace or cubic footage inside residence, 87 A.L.R.4th 294](#)

[Validity of zoning or building regulations restricting mobile homes or trailers to established mobile home or trailer parks, 17 A.L.R.4th 106](#)

[Validity, construction, and effect of restrictive covenants as to trees and shrubbery, 13 A.L.R.4th 1346](#)

[Municipal power as to billboards and outdoor advertising, 58 A.L.R.2d 1314](#)

[Validity of building height regulations, 8 A.L.R.2d 963](#)

Trial Strategy

[Zoning: Circumstances Justifying Termination of Lawful Nonconforming Use, 44 Am. Jur. Proof of Facts 3d 531](#)

[Change in Character of Neighborhood Necessary to Justify Rezoning, 41 Am. Jur. Proof of Facts 3d 443](#)

[Challenge to Rezoning Decision as Illegal Spot Zoning, 39 Am. Jur. Proof of Facts 3d 433](#)

[Zoning Action Not in Accordance With a Comprehensive Plan, 37 Am. Jur. Proof of Facts 3d 383](#)

[Zoning: Proof of Unreasonableness of Aesthetic Regulation, 29 Am. Jur. Proof of Facts 3d 491](#)

[Zoning—Circumstances Warranting Relief From Zoning Ordinance, 25 Am. Jur. Proof of Facts 3d 541](#)

[Special Damages Sufficient to Give Standing to Enjoin Zoning Violation, 1 Am. Jur. Proof of Facts 3d 495](#)

[Relief From Zoning Ordinance, 16 Am. Jur. Trials 99](#)

A state may legitimately exercise its police powers to advance aesthetic values by prohibiting the posting of all signs, including signs posted by political candidates, on public property, and municipalities have a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression.¹ Municipalities and other governing bodies, under carefully prescribed circumstances, may limit or ban the use of outdoor billboards essentially for aesthetic reasons.² Thus, a statute banning billboards containing off-premises advertising along interstate highways does not violate a state constitutional guarantee of equal protection by allowing only on-premises signs identifying the business on the property.³

Aesthetic considerations have a definite relation to the public welfare.⁴ The values represented by the public welfare are spiritual as well as physical, aesthetic as well as monetary.⁵ It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, and well-balanced as well as carefully patrolled.⁶ Nothing in the Due Process Clause bars the exercise of the police power on the basis of aesthetic considerations.⁷ Consequently, whether such a regulation should be voided should depend upon whether the restriction is an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community—and not upon whether the objectives are primarily aesthetic.⁸

It is within the constitutional power of a city to attempt to improve its appearance, and municipalities have a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression.⁹ Determining where particular business uses will be allowed to expand in a community is an appropriate exercise of the police power, and preserving the aesthetic values and economic viability of a community's downtown business core can be a proper zoning purpose.¹⁰ However, aesthetic considerations are not sufficiently compelling to justify restrictions on political speech in a public forum.¹¹

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Footnotes

¹ [Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 \(1984\).](#)

A city ordinance prohibiting portable signs furthered the city's aesthetic interest when the evidence was weighed, taking into account the need to accord deference to the judgment of the body charged with the responsibility of making determinations about aesthetics, and with care not to substitute the judgment of the court for the judgment of that body. [Lindsay v. City of San Antonio, 821 F.2d 1103 \(5th Cir. 1987\).](#)

As to municipal regulation of conduct offensive to visual sensibilities, generally, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 418](#).

2 [Metromedia, Inc. v. City of San Diego](#), 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981); [Tahoe Regional Planning Agency v. King](#), 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335 (3d Dist. 1991).

3 [State Dept. of Roads v. Popco, Inc.](#), 247 Neb. 440, 528 N.W.2d 281 (1995).

4 [City of Montgomery v. Norman](#), 816 So. 2d 72 (Ala. Crim. App. 1999); [Murphy, Inc. v. Town of Westport](#), 131 Conn. 292, 40 A.2d 177, 156 A.L.R. 568 (1944); [Baddour v. City of Long Beach](#), 279 N.Y. 167, 18 N.E.2d 18, 124 A.L.R. 1003 (1938).

5 [Berman v. Parker](#), 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

6 [Berman v. Parker](#), 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

7 [Berman v. Parker](#), 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

8 [People v. Stover](#), 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963).

9 [Members of City Council of City of Los Angeles v. Taxpayers for Vincent](#), 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

10 [Sprenger, Grubb & Associates, Inc. v. City of Hailey](#), 127 Idaho 576, 903 P.2d 741 (1995) (holding that an ordinance that rezoned certain property from business to limited business use bore a reasonable relation to the goals properly pursued by the city through its police power, as the goal of the ordinance was to encourage the central business area around downtown, to optimize the existing infrastructure and existing municipal services, and to decrease dependency on automobiles).

11 [Collier v. City of Tacoma](#), 121 Wash. 2d 737, 854 P.2d 1046 (1993).

End of Document

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16A Am. Jur. 2d Constitutional Law § 387

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

c. Interference with Property Rights

§ 387. Particular modes of interference with property rights by exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

Property rights are held subject to a reasonable exercise of the police power in behalf of the public interest.¹ Thus, the legislature may pass laws regulating the acquisition, enjoyment, and disposition of property,² even though in some respects these may operate as a restraint on individual freedom or the use of property.³

Regulation under the police power extends to the property both of private individuals⁴ and of corporations.⁵ Moreover, property of every kind is held subject to police regulation, including contractual⁶ and intangible rights.⁷

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Footnotes

- ¹ § 383.
- ² *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917); *Oscar P. Gustafson Co. v. City of Minneapolis*, 231 Minn. 271, 42 N.W.2d 809 (1950).
- ³ *Chicago Park Dist. v. Canfield*, 370 Ill. 447, 19 N.E.2d 376, 121 A.L.R. 557 (1939); *National City Bank of New York v. Del Sordo*, 16 N.J. 530, 109 A.2d 631 (1954).
- ⁴ *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 1872 WL 8780 (1872).

- 5 [Merchants' Exchange of St. Louis v. State of Missouri ex rel. Barker](#), 248 U.S. 365, 39 S. Ct. 114, 63 L. Ed. 300 (1919).
- Three county hospitals did not have a protected property interest under Ohio's competitive bidding statute to participate in the bidding process for an award of county adult indigent care funds, as required to support their claim that the county's award of the funds to a university hospital violated due process; even if the procedure followed by the county was ultimately held to have violated Ohio's competitive bidding requirement for county contracts in excess of \$25,000, the hospitals could not have a property interest in the procedure whereby the contract was or ought to have been awarded. [TriHealth, Inc. v. Board of Com'rs, Hamilton County, Ohio](#), 430 F.3d 783, 2005 FED App. 0470P (6th Cir. 2005).
- 6 § 392.
- 7 [State ex rel. Davis v. Rose](#), 97 Fla. 710, 122 So. 225 (1929); [City of Chicago v. Bowman Dairy Co.](#), 234 Ill. 294, 84 N.E. 913 (1908).

End of Document

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16A Am. Jur. 2d Constitutional Law § 388

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

3. Constitutional Limitations, in General

c. Interference with Property Rights

§ 388. Particular modes of interference with property rights by exercise of police power—Imposition of burdens and expenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

Laws are not rendered unconstitutional merely because they impose burdens on persons or property,¹ as the right to impose these burdens is an essential feature of the police power.² Hence, property owners may be required to assume all kinds of restraints and burdens so that the state may secure the general comfort and safeguard the public health.³ Moreover, a police power enactment is not rendered invalid merely because it causes a pecuniary injury,⁴ as where the value of property is diminished.⁵ Similarly, expenses may be imposed upon property owners.⁶

The fact that a party must make substantial expenditures to comply with a regulatory statute does not alone render the statute unconstitutional as an invalid exercise of police power.⁷ However, the value of the property and the amount of the expense required in order to comply with police regulations should be taken into consideration in estimating the reasonableness of a statute enacted under the police power, since an unreasonable imposition of expenses may be unconstitutional.⁸ Thus, if property is likely to become so depreciated in value because of the limited use permitted by a police power regulation that it is unfair to require the owner to bear the loss of value, the regulation may be held invalid.⁹

Footnotes

- 1 Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952); Bowles v. Willingham, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944); County of Hoke v. Byrd, 107 N.C. App. 658, 421 S.E.2d 800 (1992).
- 2 Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960); Hegeman Farms Corporation v. Baldwin, 293 U.S. 163, 55 S. Ct. 7, 79 L. Ed. 259 (1934); Porter v. City of Paris, 184 Tenn. 555, 201 S.W.2d 688 (1947).
- 3 California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204 (1905); Daniels v. City of Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512 (1928).
- 4 Plantation Anhydrous Ammonia Corp. v. Anhydrous Ammonia Com'n, 234 La. 869, 101 So. 2d 699 (1958); Graff v. Priest, 356 Mo. 401, 201 S.W.2d 945 (1947).
- 5 State v. Sullivan, 245 Minn. 103, 71 N.W.2d 895, 56 A.L.R.2d 871 (1955); Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884 (1950).
- 6 People v. Cunard White Star, 280 N.Y. 413, 21 N.E.2d 489 (1939).
- 7 In re Petition of Bailey, 626 N.W.2d 190 (Minn. Ct. App. 2001).
- 8 Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935); Missouri Pac. R. Co. v. Norwood, 283 U.S. 249, 51 S. Ct. 458, 75 L. Ed. 1010 (1931), modified on other grounds, 283 U.S. 809, 51 S. Ct. 652, 75 L. Ed. 1428 (1931).
- 9 Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78 (Sup 1953), judgment aff'd, 282 A.D. 890, 125 N.Y.S.2d 112 (2d Dep't 1953), judgment aff'd, 307 N.Y. 493, 121 N.E.2d 517 (1954).

End of Document

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16A Am. Jur. 2d Constitutional Law § 389

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 389. Fourteenth Amendment as imposing limitations on exercise of police power, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

In accordance with the settled principle that no part of the Federal Constitution was intended to hamper a valid exercise of state police power regulation,¹ the 14th Amendment was not designed to interfere with,² and in fact does not interfere with,³ impair,⁴ limit,⁵ bar,⁶ or take from the states⁷ the right duly and properly to exercise the police power. Furthermore, this amendment does not limit the subjects upon which the police power of a state may be exerted.⁸

Although the 14th Amendment does not interfere with a proper exercise of the police power, every state power, including the police power, is limited by the restraints of the 14th Amendment.⁹ Thus, liberty, guaranteed by the 14th Amendment, may not be interfered with under the guise of protecting the public interest by legislative action that is arbitrary or without a reasonable relation to some purpose that is within the competency of the state.¹⁰ The ultimate test of the propriety of police regulations must be found in the 14th Amendment, since it operates to limit the field of police power by barring the enforcement of statutes that impair the rights protected by that amendment.¹¹

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Footnotes

¹ [§ 379.](#)

- 2 Scarborough v. Newsome, 150 Fla. 220, 7 So. 2d 321 (1942); Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, 358 Ill. 239, 193 N.E. 112, 97 A.L.R. 1318 (1934); State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810 (1935); State v. Eubank, 56 Ohio App. 1, 9 Ohio Op. 192, 24 Ohio L. Abs. 482, 9 N.E.2d 1007 (6th Dist. Lucas County 1937).
- 3 Nebbia v. People of New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934); Lacoste v. Department of Conservation of State of Louisiana, 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1924); City of New Orleans v. Postek, 180 La. 1048, 158 So. 553 (1934); State v. Bonoa, 172 La. 955, 136 So. 15 (1931); Bratberg v. Advance-Rumely Thresher Co., 61 N.D. 452, 238 N.W. 552, 78 A.L.R. 1338 (1931); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).
- 4 City of Huntington v. State Water Commission, 137 W. Va. 786, 73 S.E.2d 833 (1953).
- 5 Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).
- 6 Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N.W.2d 477 (1948), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).
- 7 Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923); Thomas v. State, 252 Miss. 527, 160 So. 2d 657 (1964), *cert. granted*, judgment *rev'd* on other grounds, 380 U.S. 524, 85 S. Ct. 1327, 14 L. Ed. 2d 265 (1965); Myers v. City of Cincinnati, 128 Ohio St. 235, 190 N.E. 569 (1934).
- 8 Cunnius v. Reading School Dist, 198 U.S. 458, 25 S. Ct. 721, 49 L. Ed. 1125 (1905) (estate administration); Sowma v. Parker, 112 Vt. 241, 22 A.2d 513 (1941) (gaming).
- 9 Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley, 290 U.S. 190, 54 S. Ct. 148, 78 L. Ed. 260 (1933); State v. Ernst, 209 Minn. 586, 297 N.W. 24, 134 A.L.R. 643 (1941); Grieb v. Department of Liquor Control of State, 153 Ohio St. 77, 41 Ohio Op. 148, 90 N.E.2d 691 (1950).
- 10 State v. Williams, 253 N.C. 337, 117 S.E.2d 444, 92 A.L.R.2d 513 (1960).
- 11 State v. Danberg, 40 Del. 136, 6 A.2d 596 (Gen. Sess. 1939); State v. Betts, 21 Ohio Misc. 175, 49 Ohio Op. 2d 22, 50 Ohio Op. 2d 351, 252 N.E.2d 866 (Mun. Ct. 1969).

End of Document

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16A Am. Jur. 2d Constitutional Law § 390

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 390. Due process as imposing limitations on exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

Legislation does not violate substantive due process so long as it reasonably relates to a proper legislative goal.¹ The balance between police powers and due process is more or less in a state of unstable equilibrium, changing with sociological and economic development.² The resolution of the ultimate question in all due process cases requires striking a balance between the exercise of the police power and the interference with constitutional rights of the individual.³ When a state exercises its police power to regulate for the general welfare and a fundamental right is not at issue, statutes are subjected to a rational basis review.⁴

Procedural due process demands that the state provide meaningful standards in its laws.⁵ The legislature may constitutionally impose reasonable penalties to secure obedience to statutes enacted under the police power so long as those enactments are procedurally fair and reasonably related to a proper legislative goal.⁶ In general, the government may not interfere with an owner's use and continued possession of property without affording the owner procedural due process.⁷ The question of whether a person has a constitutionally protected property interest, for purposes of a due process claim, is answered by an independent, extra-constitutional source such as state law.⁸

A criminal law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed upon a breach.⁹ The law must also convey a comprehensible standard capable of judicial enforcement.¹⁰ Pursuant to its police power, the legislature has wide discretion to establish penalties for criminal offenses, but this discretion is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law.¹¹

The provisions of the 14th Amendment prohibiting any state from depriving any person of life, liberty, or property without due process of law generally do not operate as a limitation upon the police power of the state to pass and enforce laws that will inure to the health, morals, or general welfare of the people.¹² A state is not deprived of the power to enact regulations¹³ that are reasonable in character.¹⁴ A statute or ordinance that is a valid exercise of the police power generally does not violate the Due Process Clauses of State and Federal Constitutions.¹⁵ Indeed, regulation under a proper exercise of the police power provides due process, even though property in whole or in part is taken or destroyed¹⁶ and despite the fact that burdens and expenses of various types are imposed.¹⁷ To impose strict liability in the exercise of the police power of a state does not of itself contravene the Due Process Clauses of the Federal or State Constitution.¹⁸

Even the fact that police regulations may prevent the enjoyment of rights in property without providing compensation does not necessarily render them in violation of due process.¹⁹ On the other hand, the United States Supreme Court has pointed out that the 14th Amendment requires that governmental regulation must be accomplished by methods that are consistent with due process,²⁰ and that the Due Process Clause limits an improper exercise of the states' police power²¹ by precluding an arbitrary or unreasonable exercise of it.²²

The formula inquiring whether a government regulation of private property "substantially advances" legitimate state interests prescribes an inquiry in the nature of due process and is not an appropriate test for determining whether the regulation effects a Fifth Amendment taking.²³

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Footnotes

- 1 [People v. Travis](#), 139 Cal. App. 4th 1271, 44 Cal. Rptr. 3d 177 (1st Dist. 2006).
A statute making it a crime to have a false or secret compartment in a motor vehicle is facially invalid on due process grounds; the statute potentially criminalizes innocent conduct as it visits the status of a felon upon anyone who owns or operates a vehicle the person knows to contain a false or secret compartment, defined as one intended and designed to conceal the compartment or its contents from law enforcement officers, and the contents of the compartment do not have to be illegal for a conviction to result. [People v. Carpenter](#), 228 Ill. 2d 250, 320 Ill. Dec. 888, 888 N.E.2d 105 (2008).
- 2 [State v. Mason](#), 94 Utah 501, 78 P.2d 920, 117 A.L.R. 330 (1938).
- 3 [People v. Faxlanger](#), 1 A.D.2d 92, 147 N.Y.S.2d 595 (4th Dep't 1955), judgment aff'd, 1 N.Y.2d 393, 153 N.Y.S.2d 193, 135 N.E.2d 705 (1956).
- 4 [State v. Haskell](#), 2008 ME 82, 955 A.2d 737 (Me. 2008).
- 5 [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 6 [Starving Students, Inc. v. Department of Industrial Relations](#), 125 Cal. App. 4th 1357, 23 Cal. Rptr. 3d 583 (2d Dist. 2005).
- 7 [U.S. v. Eight Automobiles With Fraudulently Obtained Ohio and New York State Division of Motor Vehicle Titles](#), 356 F. Supp. 2d 223 (E.D. N.Y. 2005) (stating that a governmental seizure of property should be a temporary deprivation of use and possession, not a permanent transfer of title in the thing seized).
- 8 [Sueiro Vazquez v. Torregrosa De la Rosa](#), 380 F. Supp. 2d 63 (D.P.R. 2005).
- 9 [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 10 [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 11 [People v. Gorgis](#), 337 Ill. App. 3d 960, 272 Ill. Dec. 514, 787 N.E.2d 329 (1st Dist. 2003).
A statutory prohibition against the possession or use of gambling devices and the forfeiture of the prohibited devices were rationally related to preventing gambling, were valid exercises of the police power, and complied with the Due Process Clause. [State v. Two IGT Video Poker Games](#), Model FA 180, 237 Neb.

- 145, 465 N.W.2d 453 (1991) (disapproved of on other grounds by, *American Amusements Co. v. Nebraska Dept. of Revenue*, 282 Neb. 908, 807 N.W.2d 492 (2011)).
- 12 *Bute v. People of State of Ill.*, 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 1143 (1942); *Scarborough v. Newsome*, 150 Fla. 220, 7 So. 2d 321 (1942); *Hankins v. Spaulding*, 78 Idaho 533, 307 P.2d 222 (1957); *Engelsher v. Jacobs*, 5 N.Y.2d 370, 184 N.Y.S.2d 640, 157 N.E.2d 626 (1959); *White House Milk Co. v. Reynolds*, 12 Wis. 2d 143, 106 N.W.2d 441 (1960).
- A city's rent-control ordinance is not invalid, on its face, under the Due Process Clause of the Federal Constitution's 14th Amendment, by allowing a hearing officer to consider, among other factors, the hardship of the tenant in determining whether to approve a landlord's proposed rent increase in excess of 8% because the provision represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment. *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988).
- 13 *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963) (stating that in determining whether a state statute dealing with a business violates the Due Process Clause of the 14th Amendment, the United States Supreme Court will not draw lines by calling the statute "prohibitory" or "regulatory").
- 14 *Grown v. City of Cleveland*, 125 Ohio St. 455, 181 N.E. 897, 84 A.L.R. 708 (1932) (holding that the due process provisions of the State and Federal Constitutions were not violated by a reasonable classification and regulation of a private business within the constitutional limits of the police power).
- 15 *Florida Power Corp. v. Pinellas Utility Bd.*, 40 So. 2d 350 (Fla. 1949); *Walters v. Blackledge*, 220 Miss. 485, 71 So. 2d 433 (1954); *Graff v. Priest*, 356 Mo. 401, 201 S.W.2d 945 (1947); *Hertz Drivurself Stations v. Siggins*, 359 Pa. 25, 58 A.2d 464, 7 A.L.R.2d 438 (1948); *Gillaspie v. Department of Public Safety*, 152 Tex. 459, 259 S.W.2d 177 (1953); *City of Huntington v. State Water Commission*, 137 W. Va. 786, 73 S.E.2d 833 (1953).
- A probationer convicted of two counts of unarmed robbery could not challenge the requirement that he provide a blood sample under the DNA Analysis Backlog Elimination Act (DNA Act) and the District of Columbia's implementing statute as violating substantive due process under the Fifth Amendment; the taking of blood under the Act was a search and seizure under the Fourth Amendment, and analysis under that amendment applied. *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005), *aff'd*, 440 F.3d 489 (D.C. Cir. 2006).
- 16 *Beisner v. Cochran*, 138 Neb. 445, 293 N.W. 289 (1940); *Croxton v. State*, 1939 OK 504, 186 Okla. 249, 97 P.2d 11 (1939); *Gasque, Inc. v. Nates*, 191 S.C. 271, 2 S.E.2d 36 (1939).
- 17 *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955).
- 18 *Sandstrom v. California Horse Racing Bd.*, 31 Cal. 2d 401, 189 P.2d 17, 3 A.L.R.2d 90 (1948).
- 19 § 395.
- 20 *Nebbia v. People of New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469 (1934) (stating that the Fifth and 14th Amendments do not prohibit governmental regulation for the public welfare but merely require that the end be accomplished by methods consistent with due process).
- 21 *Pacific Emp. Ins. Co. v. Industrial Commission*, 219 Cal. App. 2d 634, 33 Cal. Rptr. 442 (3d Dist. 1963); *Hoff v. State*, 39 Del. 134, 197 A. 75 (Super. Ct. 1938); *State ex rel. Walters v. Blackburn*, 104 So. 2d 19 (Fla. 1958); *Connor v. Chanhassen Tp.*, 249 Minn. 205, 81 N.W.2d 789 (1957); *Northern Pac. Ry. Co. v. Warner*, 77 N.D. 721, 45 N.W.2d 196 (1950); *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938).
- 22 *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935); *Florida Accountants Ass'n v. Dandelake*, 98 So. 2d 323, 70 A.L.R.2d 425 (Fla. 1957); *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill. 2d 152, 128 N.E.2d 691 (1955); *Burlington & Summit Apartments v. Manolato*, 233 Iowa 15, 7 N.W.2d 26, 144 A.L.R. 251 (1942); *Fenster v. Leary*, 20 N.Y.2d 309, 282 N.Y.S.2d 739, 229 N.E.2d 426, 25 A.L.R.3d 784 (1967); *In re Lutker*, 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).
- 23 *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

16A Am. Jur. 2d Constitutional Law § 391

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 391. Equal protection as imposing limitations on exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A state legislature may, in the exercise of its police power, create reasonable classifications in order to eradicate or ameliorate what it perceives to be a social evil.¹ Although the guarantee of equal protection of the laws may limit a state's exercise of its police powers, legislation enacted under the police power need not apply equally and uniformly to all, as it is sufficient if the classifications created are reasonable and practicable, bearing a rational relationship to the governmental purpose to be served.² The Equal Protection Clause of the 14th Amendment of the United States Constitution, thus, does not limit the police power of a state,³ nor does it affect a proper exercise of that power.⁴ However, just as with other federal constitutional rights, the police power is subordinate to the constitutional guarantee of equal protection.⁵ Therefore, any attempted exercise of police power that denies equal protection of the laws is invalid.⁶

Under the limitations of the Equal Protection Clause, in order to justify imposing the authority of the state in enacting police regulations, the interests of the public generally must be the object sought, as distinguished from those of a particular class,⁷ as the police power may not be invoked to protect one class of citizens against another class, unless the interference is for the real protection of society in general.⁸ Thus, the police power may not be exercised to grant a privilege or immunity to particular persons or to persons in a particular locality which would allow them to violate with impunity the general statutory laws condemning activities deemed inimical to the public morals.⁹ The state may, however, enact police power legislation for the safety and protection of its citizens as the circumstances and necessities of a particular class may require, without thereby

violating any constitutional guarantee.¹⁰ Thus, in the exercise of the police power, the legislature may make classifications to promote public purposes, as perfect uniformity of treatment of all persons is impractical and undesirable.¹¹

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Footnotes

- 1 [Moore v. Mobile Infirmary Ass'n](#), 592 So. 2d 156 (Ala. 1991) (rejected on other grounds by, [Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.](#), 265 Neb. 918, 663 N.W.2d 43 (2003)).
A Texas statute limiting the amount of nonmedical damages recoverable from a health care provider such as a doctor or a hospital in a medical malpractice action does not violate the equal protection provisions of the Federal Constitution where the Texas legislature had a reasonable basis to conclude that a ceiling on recovery from certain institutions was related to the availability and cost of malpractice insurance and that such insurance and distribution of medical care in Texas were linked. [Lucas v. U.S.](#), 807 F.2d 414 (5th Cir. 1986).
- 2 [Junco v. State Bd. of Accountancy](#), 390 So. 2d 329 (Fla. 1980).
A state law that diminished a fund from which holders of certificates of indebtedness issued by a cemetery corporation were to be paid, resulting in the impairment of contract rights under the certificates, was not unconstitutional, since the establishment of maintenance funds under the statute was a reasonable and necessary means of correcting serious abuses in the operation of cemeteries. [Reed v. Knollwood Park Cemetery](#), 441 F. Supp. 1144 (E.D. N.Y. 1977).
- 3 [People v. Cordero](#), 50 Cal. App. 2d 146, 122 P.2d 648 (2d Dist. 1942); [Hankins v. Spaulding](#), 78 Idaho 533, 307 P.2d 222 (1957).
- 4 [Pennell v. City of San Jose](#), 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988); [Engelsher v. Jacobs](#), 5 N.Y.2d 370, 184 N.Y.S.2d 640, 157 N.E.2d 626 (1959); [Public Service Co. of Okl. v. Caddo Elec. Co-op.](#), 1970 OK 219, 479 P.2d 572 (Okla. 1970).
Without violating the Equal Protection Clause, the state may exercise its police power to restrict, regulate, or even prohibit any and all use of private property to promote public health, safety, and welfare. [Heimgaertner v. Benjamin Elec. Mfg. Co.](#), 6 Ill. 2d 152, 128 N.E.2d 691 (1955).
- 5 [Shelley v. Kraemer](#), 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R.2d 441 (1948); [Heimgaertner v. Benjamin Elec. Mfg. Co.](#), 6 Ill. 2d 152, 128 N.E.2d 691 (1955); [Northern Pac. Ry. Co. v. Warner](#), 77 N.D. 721, 45 N.W.2d 196 (1950).
The constitutional requirement of equal protection of the laws must be observed when laws are made under the general police power. [Florida Accountants Ass'n v. Dandelake](#), 98 So. 2d 323, 70 A.L.R.2d 425 (Fla. 1957).
- 6 [State v. Double Seven Corp.](#), 70 Ariz. 287, 219 P.2d 776, 19 A.L.R.2d 1007 (1950); [McDougall v. Lueder](#), 389 Ill. 141, 58 N.E.2d 899, 156 A.L.R. 1059 (1945); [State ex rel. Central Outdoor Advertising Co. v. Leonhard](#), 50 Ohio Op. 162, 68 Ohio L. Abs. 542, 124 N.E.2d 187 (C.P. 1953).
- 7 [Francis v. Fitzpatrick](#), 129 Conn. 619, 30 A.2d 552, 145 A.L.R. 505 (1943); [State ex rel. Week v. Wisconsin State Bd. of Examiners in Chiropractic](#), 252 Wis. 32, 30 N.W.2d 187 (1947).
- 8 [Liquor Store v. Continental Distilling Corp.](#), 40 So. 2d 371 (Fla. 1949).
- 9 [State ex rel. Taylor v. Carolina Racing Ass'n](#), 241 N.C. 80, 84 S.E.2d 390 (1954).
- 10 [Hanley v. State](#), 234 Ind. 326, 123 N.E.2d 452 (1954) (holding that the legislature may lawfully enact a law granting privileges and immunities to one class of citizens, which upon the same terms do not equally belong to all citizens, where the law was passed in a valid exercise of the police power of the state); [Kuhl Motor Co. v. Ford Motor Co.](#), 270 Wis. 488, 71 N.W.2d 420, 55 A.L.R.2d 467 (1955).
- 11 [Allinder v. City of Homewood](#), 254 Ala. 525, 49 So. 2d 108, 22 A.L.R.2d 763 (1950); [Selby v. Bullock](#), 287 So. 2d 18 (Fla. 1973); [Sherman-Reynolds, Inc. v. Mahin](#), 47 Ill. 2d 323, 265 N.E.2d 640 (1970).
Even assuming a gaming operator who offered monitor vending machines (MVM) dispensing lottery tickets to the public was similarly situated with gaming operators who offered pull-tab games or slot machines, Iowa's amended gaming statutes which would make it illegal to offer MVMs to the public did not violate equal protection, under the rational basis test, as the legislature had discretion to undertake incremental

reform of the gaming industry. [Hawkeye Commodity Promotions, Inc. v. Miller](#), 432 F. Supp. 2d 822 (N.D. Iowa 2006), judgment aff'd, 486 F.3d 430 (8th Cir. 2007).

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16A Am. Jur. 2d Constitutional Law § 392

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 392. Contracts Clause as imposing limitations on exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

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[Validity and construction of law regulating conversion of rental housing to condominiums, 21 A.L.R.4th 1083](#)

[Validity of statute, ordinance, or regulation requiring compliance with housing standards before rent increase or possession by new tenant, 20 A.L.R.4th 1246](#)

Contract rights are subject to the reasonable exercise of the police power.¹ Thus, the "impairment of contracts" clause of the United States Constitution, often referred to as the "Contract Clause," which provides that no state may pass any law impairing the obligation of contracts,² does not operate to obliterate the police powers of the states.³ States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.⁴ Otherwise, one would be able to obtain immunity from state regulation merely by entering into a private contract.⁵

The Contract Clause does not restrict the power of the states to legislate in the interest of the morals, health, or safety of the public, even though one or more of these public interests may be implicated in contracts of various kinds.⁶ Rights and privileges arising from contracts are subject to regulation for the protection of the public health, safety, and morals, in the same sense

and to the same extent as is all property, whether owned by natural persons or by corporations.⁷ Indeed, all contracts are made subject to the paramount authority of the state to safeguard the vital interests of its people.⁸ To demonstrate that state law does not violate Contracts Clause, the state has the burden of establishing that the law was a reasonable and necessary means of furthering an important public purpose.⁹ Thus, legislation that is reasonable and necessary to achieve a legitimate public purpose may be upheld even if it causes substantial impairment of a contract¹⁰ or incidentally nullifies existing contract rights.¹¹ All contracts made with reference to any matter that is subject to regulation under the police power will be deemed as having been made in reference to the possible exercise of that power.¹²

The authority of the legislature, in the exercise of its police powers, cannot be limited or restricted by the provisions of private contracts¹³ between individuals¹⁴ or between individuals and corporations.¹⁵ Thus, not all police power legislation that has the effect of impairing a contract will violate the Contract Clause.¹⁶

However, the clause imposes some limits upon the power of the state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.¹⁷ The existence of an important public interest is not always sufficient to overcome those limitations.¹⁸ Whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power, and the scope of the state's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts.¹⁹

CUMULATIVE SUPPLEMENT

Cases:

Contracts Clause does not trump the police power of a state to protect the general welfare of its citizens, a power which is paramount to any rights under contracts between individuals; thus, state laws that impair an obligation under a contract do not necessarily give rise to a viable Contracts Clause claim. [U.S. Const. art. 1, § 10, cl. 1. Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199 \(D. Conn. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [Union Pacific Resources Co. v. Texaco, Inc., 882 P.2d 212 \(Wyo. 1994\).](#)
An Oklahoma statute exempting Individual Retirement Accounts (IRAs) and Keogh accounts from a debtor's estate in bankruptcy does not constitute an unconstitutional impairment of creditors' contracts, since the statute represents a justifiable exercise of the state's inherent police power in providing for the family needs of bankrupt debtors. [In re Walker, 959 F.2d 894, 133 A.L.R. Fed. 577 \(10th Cir. 1992\).](#)
- 2 [U.S. Const. Art. I, § 10, cl. 1.](#)
- 3 [Empire Sanitary Landfill, Inc. v. Com., Dept. of Environmental Resources, 546 Pa. 315, 684 A.2d 1047 \(1996\); Massachusetts Mun. Wholesale Elec. Co. v. State, 161 Vt. 346, 639 A.2d 995 \(1994\).](#)
- 4 [U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 \(1977\).](#)
- 5 [U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 \(1977\).](#)
- 6 [Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 \(1987\); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 \(1978\); Linton by Arnold v. Commissioner of Health and Environment, State of Tenn., 65 F.3d 508, 1995 FED App. 0278P \(6th Cir. 1995\); Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare, 742](#)

F.2d 442 (8th Cir. 1984); *Subway-Surface Sup'rs Ass'n v. New York City Transit Authority*, 44 N.Y.2d 101, 404 N.Y.S.2d 323, 375 N.E.2d 384 (1978); *Benjamin v. City of Columbus*, 167 Ohio St. 103, 4 Ohio Op. 2d 113, 146 N.E.2d 854 (1957).

Even if a substantial contractual right of the railroad was impaired by the requirement in a Nebraska statute that the last car on any train over 1,000-feet long be a manned caboose, the State exercised its police power in the public interest and there was no evidence of any protectionist intent so that the statute did not violate the Contract Clause. *Burlington Northern R. Co. v. State of Neb.*, 802 F.2d 994, 21 Fed. R. Evid. Serv. 794 (8th Cir. 1986).

Allegation in a Section 1983-action brought by a traveler's checks issuer, that 65% to 75% of all traveler's checks uncashed after seven years were cashed within 15 years and therefore were not forgotten by the original purchasers, was sufficient to state a claim that a reduction in Kentucky's presumptive abandonment period prevented the issuer from being afforded any certainty in its implied contracts with purchasers of traveler's checks in violation of the Contract Clause. *American Exp. Travel Related Services, Inc. v. Kentucky*, 597 F. Supp. 2d 717 (E.D. Ky. 2009).

7 *Stephenson v. Binford*, 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721 (1932); *Lutz v. New Albany City Plan Com'n*, 230 Ind. 74, 101 N.E.2d 187 (1951); *City of Akron v. Public Utilities Commission*, 149 Ohio St. 347, 37 Ohio Op. 39, 78 N.E.2d 890 (1948); *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955).

A Boston rent-control plan did not impair the contract rights of plaintiffs under a contract with the FHA into which they had entered as participants in a housing program where as a consequence of the rent control, the plaintiffs received significantly less than the FHA-approved rent, resulting in a diminution of their rights under the contract with the FHA. *Kargman v. Sullivan*, 582 F.2d 131 (1st Cir. 1978).

8 *Veix v. Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *City of Akron v. Public Utilities Commission*, 149 Ohio St. 347, 37 Ohio Op. 39, 78 N.E.2d 890 (1948); *Greyhound Lines, Inc. v. Corporation Commission*, 1967 OK 80, 430 P.2d 1 (Okla. 1967).

9 *North Carolina Ass'n of Educators, Inc. v. State*, 241 N.C. App. 284, 776 S.E.2d 1, 321 Ed. Law Rep. 538 (2015), decision aff'd as modified on other grounds, 368 N.C. 777, 786 S.E.2d 255, 331 Ed. Law Rep. 485 (2016).

10 *Caritas Services, Inc. v. Department of Social and Health Services*, 123 Wash. 2d 391, 869 P.2d 28 (1994).

11 *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086 (1935); *Florida Power Corp. v. Pinellas Utility Bd.*, 40 So. 2d 350 (Fla. 1949); *In re Department of Bldgs. of City of New York*, 14 N.Y.2d 291, 251 N.Y.S.2d 441, 200 N.E.2d 432 (1964); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420, 55 A.L.R.2d 467 (1955).

12 *Kindleberger v. Lincoln Nat. Bank of Wash.*, 155 F.2d 281, 167 A.L.R. 1011 (App. D.C. 1946); *Cincinnati Gas & Elec. Co. v. Arnold*, 55 Ohio App. 2d 261, 9 Ohio Op. 3d 403, 380 N.E.2d 763 (1st Dist. Hamilton County 1978).

13 *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949).

14 *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 31 N.W.2d 477 (1948), aff'd, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949); *Grove Hill Realty Co. v. Ferncliff Cemetery Ass'n*, 7 N.Y.2d 403, 198 N.Y.S.2d 287, 165 N.E.2d 858 (1960).

15 *Dillingham v. McLaughlin*, 264 U.S. 370, 44 S. Ct. 362, 68 L. Ed. 742 (1924); *Grove Hill Realty Co. v. Ferncliff Cemetery Ass'n*, 7 N.Y.2d 403, 198 N.Y.S.2d 287, 165 N.E.2d 858 (1960).

16 *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978); *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *Benjamin v. City of Columbus*, 167 Ohio St. 103, 4 Ohio Op. 2d 113, 146 N.E.2d 854 (1957).

17 *Educational Employees Credit Union v. Mutual Guar. Corp.*, 50 F.3d 1432 (8th Cir. 1995); *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996); *Robert T. Foley Co. v. Washington Suburban Sanitary Commission*, 283 Md. 140, 389 A.2d 350 (1978).

18 *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977).

19 *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977).

16A Am. Jur. 2d Constitutional Law § 393

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 393. Contracts Clause as imposing limitations on exercise of police power —Determination of whether police power measure violates Contract Clause

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The first step in determining whether a particular exercise of the state's police power burdens or permissibly interferes with obligations arising under an existing private contract is to inquire into the severity of the law's impact on the contract, and there is no violation of the Contract Clause if only a minimal alteration of contractual obligations is present.¹ A serious alteration of the terms of a contract resulting from state legislation is permissible, under the Contract Clause, if, but only if, the legislation is necessary to meet a broad and pressing social or economic need, if the legislation is reasonably adapted to the solution of the problem involved and if it is not overbroad or over harsh.² To be constitutionally objectionable, the law at issue must cause a substantial impairment of contract rights.³ If the impairment is sufficiently significant to warrant the court in inquiring further, it must determine whether the law is both reasonable and necessary to fulfill a public purpose that is legitimate⁴ and important.⁵ A significant and legitimate public purpose behind the regulation, justifying a substantial impairment of a contractual relationship, may be a broad and general social or economic problem.⁶

The fact that the clear intent of a regulation is to protect a basic interest of society, as opposed to the special interests of individuals or groups, will tend to establish that the law is necessary and reasonable.⁷ The means adopted must be reasonably adapted to accomplish the legislative end⁸ and must not be arbitrary or oppressive.⁹ While even a substantial impairment of a contractual obligation may pass constitutional muster if it is reasonable and necessary to serve an important public purpose,¹⁰

it must be clearly shown that the public interest requires the measure.¹¹ It is frequently proper to defer to the state legislature's judgment on the question of whether a police power measure is reasonable, although this deference is not always appropriate.¹²

Observation:

Where the statute or regulation at issue applies to an area that has historically been subject to extensive state regulation, an individual's expectations as to the immutability of contract are reduced, and thus, such a statute or regulation is more likely to be upheld.¹³

The United States Supreme Court has also recognized the existence of various circumstances which, apart from any determination of necessity and reasonableness, will render a police power measure affecting private contracts permissible despite the restraints of the Contract Clause. In addition to the circumstance that such a measure merely affects contractual remedies,¹⁴ the Court has acknowledged that if the police power measure acts only on later contracts rather than preexisting agreements, it will be outside the purview of the Contract Clause.¹⁵ Consistent with this reasoning, the Court has recognized that state police power enactments do not impair the obligations of contracts if they simply validate what were void or voidable private contracts or merely limit private parties to the benefit of their original bargains.¹⁶

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Footnotes

- 1 [Allied Structural Steel Co. v. Spannaus](#), 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978); [Hunt v. Chemical Waste Management, Inc.](#), 584 So. 2d 1367 (Ala. 1991), decision rev'd on other grounds, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992); [West End Tenants Ass'n v. George Washington University](#), 640 A.2d 718 (D.C. 1994); [Rousselle v. Plaquemines Parish School Bd.](#), 633 So. 2d 1235, 90 Ed. Law Rep. 519 (La. 1994).
- 2 [Hawkeye Commodity Promotions, Inc. v. Miller](#), 432 F. Supp. 2d 822 (N.D. Iowa 2006), judgment aff'd, 486 F.3d 430 (8th Cir. 2007).
- 3 [Sanitation and Recycling Industry, Inc. v. City of New York](#), 107 F.3d 985 (2d Cir. 1997); [Romein v. General Motors Corp.](#), 436 Mich. 515, 462 N.W.2d 555 (1990), aff'd, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).
Iowa's amended gaming statutes, which would make it illegal for retailers to offer monitor vending machines (MVM) dispensing lottery tickets to the public, would not substantially impair a gaming operator's preexisting location contracts with business premises owners, and thus, there was no violation of the Contract Clause; the location contracts granted rights to the operator "as may be allowed by law or promulgated regulation," thereby providing for contract termination, under the location contracts' own terms, if the legislation no longer allowed MVMs to be offered to the public. [Hawkeye Commodity Promotions, Inc. v. Miller](#), 432 F. Supp. 2d 822 (N.D. Iowa 2006), judgment aff'd, 486 F.3d 430 (8th Cir. 2007).
- 4 [Hunt v. Chemical Waste Management, Inc.](#), 584 So. 2d 1367 (Ala. 1991), decision rev'd on other grounds, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992); [Professional Fire Fighters of New Hampshire v. State](#), 167 N.H. 188, 107 A.3d 1229 (2014) (significant and legitimate public purpose); [Tyrpak v. Daniels](#), 124 Wash. 2d 146, 874 P.2d 1374 (1994).

If a state regulation constitutes a substantial impairment of contractual rights, for purposes of a claim alleging violation of the Contracts Clause, the court then determines whether there is a significant and legitimate public purpose behind the regulation. *TF-Harbor, LLC v. City of Rockwall, Tex.*, 18 F. Supp. 3d 810 (N.D. Tex. 2014), *aff'd*, 592 Fed. Appx. 323 (5th Cir. 2015).

In re Seltzer, 104 F.3d 234 (9th Cir. 1996).

As to an emergency as warranting a police power enactment, see § 394.

Educational Employees Credit Union v. Mutual Guar. Corp., 50 F.3d 1432 (8th Cir. 1995).

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978); *Veix v. Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995).

Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997); *City of Charleston v. Public Service Com'n of West Virginia*, 57 F.3d 385 (4th Cir. 1995); *Rousselle v. Plaquemines Parish School Bd.*, 633 So. 2d 1235, 90 Ed. Law Rep. 519 (La. 1994); *Romein v. General Motors Corp.*, 436 Mich. 515, 462 N.W.2d 555 (1990), *aff'd*, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992); *Tyrpak v. Daniels*, 124 Wash. 2d 146, 874 P.2d 1374 (1994).

An act, creating an authority to regulate the use of water taken from an aquifer, does not unconstitutionally impair the obligation of contracts but rather is a valid exercise of the police power necessary to safeguard the public safety and welfare, even when it is applied retroactively. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996).

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978); *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A.L.R. 1279 (1945); *Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc.*, 142 F. Supp. 469 (D. Minn. 1956); *Springer v. Colburn*, 162 So. 2d 513 (Fla. 1964); *State ex rel. Kansas City v. Public Service Commission*, 524 S.W.2d 855 (Mo. 1975); *City of Akron v. Public Utilities Commission*, 149 Ohio St. 347, 37 Ohio Op. 39, 78 N.E.2d 890 (1948).

Opinion of the Justices, 135 N.H. 625, 609 A.2d 1204 (1992); *Retired Adjunct Professors of the State of R.I. v. Almond*, 690 A.2d 1342, 117 Ed. Law Rep. 205 (R.I. 1997).

Gulf States Utilities Co. v. Louisiana Public Service Com'n, 633 So. 2d 1258 (La. 1994).

U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34, 160 A.L.R. 1279 (1945).

Kraebel v. New York City Dept. of Housing Preservation and Development, 959 F.2d 395 (2d Cir. 1992) (rental of residential property in New York City); *Indiana Dept. of Environmental Management v. Chemical Waste Management, Inc.*, 643 N.E.2d 331 (Ind. 1994) (hazardous waste disposal); *East Prince Frederick Corp. v. Board of County Com'rs of Calvert County*, 320 Md. 178, 577 A.2d 27 (1990) (regulation of public water and sewer systems).

U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *City of El Paso v. Simmons*, 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957).

Watson v. Employers Liability Assur. Corp., 348 U.S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954); *Irving Trust Co. v. Day*, 314 U.S. 556, 62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093 (1942).

Gelfert v. National City Bank of New York, 313 U.S. 221, 61 S. Ct. 898, 85 L. Ed. 1299, 133 A.L.R. 1467 (1941); *Honeyman v. Jacobs*, 306 U.S. 539, 59 S. Ct. 702, 83 L. Ed. 972 (1939).

16A Am. Jur. 2d Constitutional Law § 394

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 394. Contracts Clause as imposing limitations on exercise of police power—Emergency legislation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

State legislatures have police power authority, subject to limitations, empowering them to enact statutes during emergencies to cope with unusual exigencies.¹ That authority is subject to certain constitutional restraints, however, and a law that depends upon the existence of an emergency to justify it may cease to operate if the emergency ceases, even though the law was valid when passed.² Thus, when the reserved power of the state is exercised, to meet a public need such as a pressing public disaster, and the enforcement of existing contracts is affected, that action must be limited by reasonable conditions that are appropriate to the emergency.³ However, it is settled that the police power may be exercised without violating the true intent of the provision forbidding impairment of the obligation of contracts, in directly preventing by a temporary and conditional restraint the immediate and literal enforcement of a contractual obligation, where vital public interests would otherwise suffer.⁴

The existence of an emergency need for legislation is a factor tending to establish the necessity and reasonableness of a state's exercise of its police power, and hence, its validity under the Contract Clause, even though the measure affects existing private contractual arrangements.⁵ A statute impairing the obligation of a contract may be justified in times of emergency as an exercise of the police power.⁶ An economic crisis may be such an emergency.⁷ The constitutional prohibition should not be construed to prevent limited and temporary interpositions concerning the enforcement of contracts if economic circumstances have produced an urgent public necessity.⁸ Wage control laws have been upheld against Contract Clause challenges,⁹ as have rent-control laws.¹⁰

Observation:

Although acknowledging that the existence of an emergency is one of the factors that may justify a state's exercise of its police power in a way that affects private contracts, this does not mean that only an emergency of great magnitude may constitutionally justify a state law impairing the obligations of contracts.¹¹

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Footnotes

- 1 [Patterson v. Carey](#), 41 N.Y.2d 714, 395 N.Y.S.2d 411, 363 N.E.2d 1146 (1977) (stating that the Nonimpairment Clause of the Federal Constitution cannot be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity).
- 2 [§ 338](#).
- 3 [Waterville Realty Corp. v. City of Eastport](#), 136 Me. 309, 8 A.2d 898 (1939).
- 4 [Waterville Realty Corp. v. City of Eastport](#), 136 Me. 309, 8 A.2d 898 (1939).
- 5 [Allied Structural Steel Co. v. Spannaus](#), 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978); [U.S. Trust Co. of New York v. New Jersey](#), 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); [Gelfert v. National City Bank of New York](#), 313 U.S. 221, 61 S. Ct. 898, 85 L. Ed. 1299, 133 A.L.R. 1467 (1941); [Veix v. Sixth Ward Building & Loan Ass'n of Newark](#), 310 U.S. 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940).
- 6 [Home Bldg. & Loan Ass'n v. Blaisdell](#), 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934); [Hillsborough County v. Bregenzer](#), 151 Fla. 747, 10 So. 2d 498 (1942).
- 7 [Home Bldg. & Loan Ass'n v. Blaisdell](#), 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934).
- 8 [Home Bldg. & Loan Ass'n v. Blaisdell](#), 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934); [Waterville Realty Corp. v. City of Eastport](#), 136 Me. 309, 8 A.2d 898 (1939).
A serious shortage of natural gas for consumption and use by consumers within the state is an emergency warranting exercise of the police power by way of a temporary and statewide order of the public utilities commission, binding on all parties to contracts for the sale and purchase of natural gas, whether municipalities, corporations, or individuals. [City of Akron v. Public Utilities Commission](#), 149 Ohio St. 347, 37 Ohio Op. 39, 78 N.E.2d 890 (1948).
- 9 [Subway-Surface Sup'rs Ass'n v. New York City Transit Authority](#), 44 N.Y.2d 101, 404 N.Y.S.2d 323, 375 N.E.2d 384 (1978) (holding that there was no basis on which to disturb a legislative finding that imposition of the wage freeze provisions of the New York State Financial Emergency Act for the City of New York on employees of the New York City Transit Authority, which performs governmental functions of the city and receives a substantial portion of its financial support from city funds, was necessary to the alleviation of the financial crisis confronting the city).
- 10 [Taylor v. Brown](#), 137 F.2d 654 (Emer. Ct. App. 1943) (holding that a maximum rent regulation established pursuant to the Emergency Price Control Act of 1942 and the control provisions of the Act were not unconstitutional as impairing the obligation of existing lease contracts).
- 11 [Allied Structural Steel Co. v. Spannaus](#), 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978).

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16A Am. Jur. 2d Constitutional Law § 395

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 395. Appropriation of private property by exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Validity of Extraterritorial Condemnation by Municipality](#), 44 A.L.R.6th 259

[Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated—state takings](#), 49 A.L.R.5th 769

[Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect](#), 23 A.L.R.5th 834

[Local use zoning of wetlands or flood plain as taking without compensation](#), 19 A.L.R.4th 756

[Constitutional rights of owner as against destruction of building by public authorities](#), 14 A.L.R.2d 73

[Construction and Application of "Public Use" Restriction in Fifth Amendment's Takings Clause—United States Supreme Court Cases](#), 10 A.L.R. Fed. 2d 407

[What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases](#), 10 A.L.R. Fed. 2d 231

The fact that police power laws may prevent the enjoyment of certain individual rights in property without providing compensation does not necessarily render those laws unconstitutional as violating the Due Process Clause or as appropriating

private property for public use without compensation.¹ Such laws, when reasonable and adapted to the scope and objects covered by the police power, are not considered as appropriating private property for public use but simply as regulating its use and enjoyment by the owner. If the owner suffers injury, it is either *damnum absque injuria* (a loss without compensable injury), or the owner is deemed as a matter of law to have been compensated by sharing in the general public benefits that the regulations are intended and calculated to secure.²

The Takings Clause of the Fifth Amendment to the United States Constitution,³ which applies to the states through the 14th Amendment,⁴ does not prohibit the taking of private property outright but instead places conditions on the exercise of that power.⁵ The provision is designed not to limit governmental interference with property rights per se but rather to secure compensation in the event of an otherwise proper interference amounting to a taking.⁶ Accordingly, acts that are done through the proper exercise of the police power and merely impair the use of property do not amount to a constitutional "taking," and thus, do not entitle the property owner to compensation or other relief for the damages sustained.⁷

A regulation effects a taking, however, if it does not substantially advance legitimate state interests.⁸ The analysis of the question of a regulatory taking necessarily requires a weighing of private and public interests and a careful examination and weighing of all the relevant circumstances in this context.⁹ Courts, thus, consider all surrounding circumstances in applying a fact-sensitive test of reasonableness.¹⁰

Observation:

Simply denominating a governmental measure as a business regulation does not immunize the measure from constitutional challenge on the ground that the measure constitutes an uncompensated taking.¹¹

The "public purpose" needed to justify the exercise of the eminent domain power, is to be construed broadly, reflecting a longstanding policy of judicial deference to legislative judgments in that field.¹² Although deference must be paid to a government's determination that there is sufficient evidence to support a taking in a case in which the taking is for a use that has previously been determined to be a public use, that deferential review is not satisfied by merely superficial scrutiny.¹³

Although the sovereign may not use its eminent domain power to take property of one private party for the sole purpose of transferring it to another private party, even if the first party is paid just compensation,¹⁴ a city's exercise of eminent domain power in furtherance of an economic-development plan satisfies the constitutional "public use" requirement, even if the city does not plan to open the condemned land to use by the general public, so long as the plan serves a public purpose.¹⁵

For purposes of determining whether governmental regulation of the use of property constitutes a "taking" for purposes of the Fifth Amendment's prohibition against the taking of private property for public use without just compensation, confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title to property.¹⁶ Where the government requires an owner to suffer a permanent physical invasion of its property, however minor, the government must provide just compensation.¹⁷ The fact that the governmental regulation prevents the most profitable use of property is not

dispositive, as a reduction in the value of property is not necessarily equivalent to a "taking."¹⁸ Thus, under the police power, payment need not be made for a diminution in the allowable use of property, even though it amounts to an actual taking or destruction of the property.¹⁹ A fine or forfeiture imposed by government does not constitute a compensable taking of personal property under the Fifth Amendment.²⁰

Governmental action in the form of regulation may be so onerous as to constitute a taking which constitutionally requires compensation.²¹ There is no set formula to determine where regulation begins and taking ends,²² and no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate.²³ Although formulas and factors have been developed in a variety of settings, resolution of each case ultimately calls as much for the exercise of judgment as for the application of logic.²⁴ For the legislature to enact a valid statute pursuant to its police power that results in a total destruction of property without compensation, the statute must be justified by the narrowest limits of actual necessity and the threat must present an imminent danger.²⁵

Mere regulation is unconstitutional if it has no direct grounding in the public good or is not reasonably adapted to its purpose, or arbitrarily discriminates between classes.²⁶ Absent the factors of governmental displacement of private ownership, occupation, or management, the proper remedy for an invalid police regulation is a declaration of unconstitutionality and not compensation for a taking as in eminent domain.²⁷ The only exception to that limitation is where the government intends that the property will eventually come into public ownership or where the government has already intruded upon the property and inflicted virtually irreversible damage.²⁸

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Footnotes

- 1 U.S. v. Locke, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985); New Orleans Public Service v. City of New Orleans, 281 U.S. 682, 50 S. Ct. 449, 74 L. Ed. 1115 (1930); Beisner v. Cochran, 138 Neb. 445, 293 N.W. 289 (1940); Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420, 55 A.L.R.2d 467 (1955).
- 2 PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980); New Orleans Public Service v. City of New Orleans, 281 U.S. 682, 50 S. Ct. 449, 74 L. Ed. 1115 (1930); Metro Realty v. El Dorado County, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (3d Dist. 1963); Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965); Charles v. Diamond, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955).
- 3 U.S. Const. Amend. V.
- 4 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).
- 5 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).
- 6 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).
- 7 Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979); State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962 (1933); Pasternack v. Bennett, 138 Fla. 663, 190 So. 56 (1939); Spitler v. Town of Munster, 214 Ind. 75, 14 N.E.2d 579, 115 A.L.R. 1395 (1938); Cities Service Oil Co. v. City of New York, 5 N.Y.2d 110, 180 N.Y.S.2d 769, 154 N.E.2d 814 (1958); Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N.W.2d 84, 138 A.L.R. 495 (1941).
The government's seizure of drugs as part of an investigation into the illegal diversion of drugs from the export market and their retention until after their expiration date did not constitute a compensable taking, since the property was held by the government through the exercise of power to protect the health, safety, and welfare of public. *Interstate Cigar Co. v. U.S.*, 32 Fed. Cl. 66 (1994).
- 8 Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004).
- 9 Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004).
- 10 Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004).

- 11 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).
- 12 Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).
- 13 Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 14 Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), dismissed, 60 Fed. Appx. 123 (9th Cir. 2003); Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 15 Kelo v. City of New London, Conn., 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).
- 16 Kaiser Aetna v. U. S., 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979).
- 17 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).
The Telecommunications Act, as implemented by the Federal Communications Commission and applied by the Colorado Public Utilities Commission, did not affect a physical taking of 14 local telephone loops without just compensation by obligating telephone company which owned the loops to lease them to a competitor, as lease did not transfer ownership to competitor and "lift and lay" procedure which switched loops to competitor's network did not involve any physical invasion or occupation by competitor. *Qwest Corp. v. U.S.*, 48 Fed. Cl. 672 (2001).
- 18 Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981).
- 19 *United States v. Caltex*, 344 U.S. 149, 73 S. Ct. 200, 97 L. Ed. 157 (1952).
As to the destruction of property, see §§ 636, 637.
- 20 *Gonzalez-Alvarez v. Rivero-Cubano*, 426 F.3d 422 (1st Cir. 2005) (holding that an agency's cancellation of a Puerto Rican dairy farmer's milk-production quota was a sanction for the farmer's milk adulteration, and the cancellation was no different from any other fine or forfeiture for engaging in a harmful activity).
- 21 *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).
Iowa's amended gaming statutes, which would make it illegal for retailers to offer monitor vending machines (MVM), did not constitute a per se regulatory taking of MVMs owned by a gaming operator; the amended gaming statutes would not appropriate the MVMs, require the operator to surrender the MVMs, require the operator to cease operating as a business, or condemn the operator's business. *Hawkeye Commodity Promotions, Inc. v. Miller*, 432 F. Supp. 2d 822 (N.D. Iowa 2006), judgment aff'd, 486 F.3d 430 (8th Cir. 2007).
- 22 *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).
- 23 Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).
- 24 Andrus v. Allard, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979).
- 25 *Haire v. Florida Dept. of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004).
- 26 *Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas*, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (1935).
- 27 *Charles v. Diamond*, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977).
- 28 *Charles v. Diamond*, 41 N.Y.2d 318, 392 N.Y.S.2d 594, 360 N.E.2d 1295 (1977).

End of Document

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16A Am. Jur. 2d Constitutional Law § 396

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Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 396. Appropriation of private property by exercise of police power—State constitutional protections

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

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[Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect, 23 A.L.R.5th 834](#)

[Local use zoning of wetlands or flood plain as taking without compensation, 19 A.L.R.4th 756](#)

[Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73](#)

[Construction and Application of "Public Use" Restriction in Fifth Amendment's Takings Clause—United States Supreme Court Cases, 10 A.L.R. Fed. 2d 407](#)

[What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases, 10 A.L.R. Fed. 2d 231](#)

Some states have their own constitutional provisions limiting the taking of property for public use¹ which may provide greater protection than is conferred under the Takings Clause of the Federal Constitution.² Although a state constitution may bestow the sovereign with the mighty power to take private property against the will of the individual owner, it may also confer an inviolable right of property on the people.³

When a state elects to take private property without the owner's consent, it may be required under its constitution to proceed with due concern for the venerable rights it is taking.⁴ The statutory power to authorize a taking that the legislature has delegated to a board need not be coextensive with the permissible scope of eminent domain under the United States Constitution.⁵

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Footnotes

- 1 [Pheasant Bridge Corp. v. Township of Warren](#), 169 N.J. 282, 777 A.2d 334 (2001).
- 2 [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 3 [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 4 [Norwood v. Horney](#), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).
- 5 [Providence and Worcester R.R. Co. v. Energy Facilities Siting Bd.](#), 453 Mass. 135, 899 N.E.2d 829 (2009).

End of Document

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16A Am. Jur. 2d Constitutional Law § 397

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Constitutional Law

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 397. Guarantees of freedom of speech, press, religion, and assembly as imposing limitations on exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

A.L.R. Library

[Validity of State or Local Enactment Regulating Sound Amplification in Public Area, 122 A.L.R.5th 593](#)

[Validity, construction, and application of state or local enactments regulating parades, 80 A.L.R.5th 255](#)

[Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261](#)

[Validity, under First Amendment and 42 U.S.C.A. sec. 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus, 50 A.L.R. Fed. 516](#)

The constitutional rights of freedom of speech and of the press are not contravened by reasonable regulations that are necessary to promote or preserve the public welfare.¹ Thus, if a municipal regulation provides only ineffective or remote support for the government's purpose, it will not be upheld against a First Amendment challenge.² Under the intermediate scrutiny standard of the First Amendment standard, a content-neutral governmental regulation will be sustained if it furthers an important or substantial government interest, the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.³ To defend a

regulation against a First Amendment challenge, the government must assert a substantial interest to be achieved by restrictions on commercial speech, and the restriction must directly advance that substantial interest.⁴

A municipal ordinance prohibiting the posting of signs on public property is not unconstitutional as applied to the expressive activities of a group of supporters of a political candidate.⁵ Although signs are a form of expression protected by the Free Speech Clause of the First Amendment, governments may, consistent with that provision, regulate the physical characteristics of signs, just as states may, within reasonable bounds and absent a censorial purpose, regulate audible expression that amounts to noise.⁶ Furthermore, although the First Amendment to the United States Constitution does not prevent a private shopping center owner from prohibiting the distribution on the center's premises of handbills unrelated to the center's operation, this does not limit a state's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.⁷ The existence of the right of freedom of speech does not require legislators to be insensitive to claims by citizens to comfort and convenience⁸ or to a legislative body's desire to curtail visual clutter resulting from the posting of signs.⁹

The constitutional protection of religious freedom¹⁰ does not exempt a person from complying with reasonable civil requirements imposed by the state in the interest of public welfare¹¹ and does not bar legislative control of acts inimical to the peace, good order, and morals of society.¹² State legislatures may regulate conduct for the protection of society and to the extent that their regulations are directed toward the proper end and are not unreasonably discriminatory, they may indirectly affect religious activity without infringing the constitutional guarantee.¹³

As are the freedoms of speech, press, and religion, the freedom to assemble peaceably and to petition the government, guaranteed by the First Amendment, is subject to reasonable regulation to protect the general welfare.¹⁴

Observation:

A control and restraint by the state under its inherent police powers, which would otherwise contravene the Constitution, may be justified if the regulation serves a significant state interest that is not present in the case of an adult which arises from the fact of some rationally perceived youthful vulnerability to harm.¹⁵

In the use of its police power, a state may not unduly suppress a free communication of views under the guise of conserving desirable conditions.¹⁶

Regulations in the interests of public safety, health, welfare, or convenience may not abridge the individual liberty secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion.¹⁷ Accordingly, an individual or group of individuals may not be deprived of their constitutional rights of assembly, speech, and worship merely because they have become so unpopular with or offensive to the people of a community that their presence in a public place to deliver a lecture may, or is even likely to, result in riot and bloodshed.¹⁸

Although the state may place modest and reasonable restrictions on the free exercise of religion regarding the times, places, and methods it may be practiced, only the gravest abuses that endanger paramount interests will justify any permissible limitation of religious freedom itself, as a mere rational relationship to some colorable state interest will not suffice.¹⁹

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Footnotes

- 1 [Haggerty v. Associated Farmers of Cal.](#), 44 Cal. 2d 60, 279 P.2d 734 (1955); [State ex rel. Nicholas v. Headley](#), 48 So. 2d 80 (Fla. 1950); [State v. Derrickson](#), 97 N.H. 91, 81 A.2d 312 (1951); [People v. Stover](#), 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963); [American Cancer Soc. v. City of Dayton](#), 160 Ohio St. 114, 51 Ohio Op. 32, 114 N.E.2d 219 (1953); [Slater v. Salt Lake City](#), 115 Utah 476, 206 P.2d 153, 9 A.L.R.2d 712 (1949).
In the exercise of its police power, a municipality may issue reasonable and necessary regulations as to means of communication, and such regulations do not violate the constitutional guarantee of free speech. [Wollam v. City of Palm Springs](#), 59 Cal. 2d 276, 29 Cal. Rptr. 1, 379 P.2d 481 (1963).
As to constitutionally protected freedom of speech and press, generally, see §§ 458 to 553.
- 2 [Pacific Frontier v. Pleasant Grove City](#), 414 F.3d 1221 (10th Cir. 2005).
- 3 [Comcast of California I, Inc. v. City of Walnut Creek, Cal.](#), 371 F. Supp. 2d 1147 (N.D. Cal. 2005).
- 4 [Pacific Frontier v. Pleasant Grove City](#), 414 F.3d 1221 (10th Cir. 2005).
- 5 [Members of City Council of City of Los Angeles v. Taxpayers for Vincent](#), 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (finding that the ordinance curtailed no more speech than was necessary to accomplish its purpose of eliminating visual clutter).
- 6 [City of Ladue v. Gilleo](#), 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (stating that signs take up space and may sometimes obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation and are subject to municipalities' police powers).
- 7 [PruneYard Shopping Center v. Robins](#), 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).
- 8 [Kovacs v. Cooper](#), 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A.L.R.2d 608 (1949) (upholding a city ordinance prohibiting the operation upon the streets of sound amplifiers or other instruments emitting "loud and raucous" noises and attached to vehicles operated on or standing upon such streets).
An ordinance prohibiting loitering on any street or sidewalk or conducting oneself in any public place so as to obstruct the free and uninterrupted passage of the public was not an unwarranted abridgment of a "sit-in" protestor's freedom of speech, as the ordinance was a proper exercise of the city's police power. [People v. Deutsch](#), 19 Mich. App. 74, 172 N.W.2d 392 (1969).
- 9 [Members of City Council of City of Los Angeles v. Taxpayers for Vincent](#), 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).
City ordinances prohibiting off-site advertising while permitting on-site advertising directly advanced its governmental interests in safety and aesthetics, as required to withstand First Amendment scrutiny as a restriction on commercial speech, notwithstanding that the ordinance was under-inclusive in permitting on-site advertising. [Longview Outdoor Advertising Co., LLC v. City of Winter Garden, Fla.](#), 426 F. Supp. 2d 1269 (M.D. Fla. 2006).
- 10 §§ 424 to 457.
- 11 [State v. Bullard](#), 267 N.C. 599, 148 S.E.2d 565 (1966); [Rice v. Commonwealth](#), 188 Va. 224, 49 S.E.2d 342, 3 A.L.R.2d 1392 (1948).
There are circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place. [Sause v. Bauer](#), 138 S. Ct. 2561, 201 L. Ed. 2d 982 (2018).
- 12 [Harden v. State](#), 188 Tenn. 17, 216 S.W.2d 708 (1948) (upholding a statute forbidding the display, exhibition, handling, or using poisonous or dangerous snakes or reptiles in a manner that endangers life or health).
Governmental regulation of overt acts prompted by religious beliefs or principles may be permissible, notwithstanding the "free exercise" clause of the First Amendment, if the regulated conduct poses a substantial threat to public safety, peace, or order. [Sherbert v. Verner](#), 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

- 13 [Perez v. Lippold](#), 32 Cal. 2d 711, 198 P.2d 17 (1948); [Dill v. Hamilton](#), 137 Neb. 723, 291 N.W. 62, 129 A.L.R. 743 (1940).
- 14 [State v. Sinchuk](#), 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515 (1921); [Thomas v. City of Indianapolis](#), 195 Ind. 440, 145 N.E. 550, 35 A.L.R. 1194 (1924); [Com. v. Surridge](#), 265 Mass. 425, 164 N.E. 480, 62 A.L.R. 402 (1929); [Spriggs v. Clark](#), 45 Wyo. 62, 14 P.2d 667, 83 A.L.R. 1364 (1932).
As to constitutionally protected freedom to assemble and petition, generally, see §§ 554 to 577.
- 15 [Aladdin's Castle, Inc. v. City of Mesquite](#), 630 F.2d 1029 (5th Cir. 1980), judgment rev'd in part on other grounds, 455 U.S. 283, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982).
- 16 [Feiner v. New York](#), 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 295 (1951) (holding that a speaker on a public street was properly convicted of disorderly conduct); [Wollam v. City of Palm Springs](#), 59 Cal. 2d 276, 29 Cal. Rptr. 1, 379 P.2d 481 (1963).
A township ordinance regulating the licensing of adult cabarets comprised sufficient procedural safeguards to insure that its prior restraint on freedom of expression comported with the First Amendment; the ordinance required the township board to approve license applications in the absence of specified conditions including false or incomplete applications and a violation of existing zoning laws, there was no reason to doubt the willingness of the state courts to undertake judicial review provided for under applicable state law, and the ordinance effectively preserved the status quo by requiring the issuance of a temporary permit, pending the outcome of judicial review, in the event of an application denial. [Deja Vu of Cincinnati, L.L.C. v. Union Tp. Bd. of Trustees](#), 411 F.3d 777, 2005 FED App. 0270P (6th Cir. 2005).
- 17 [Schneider v. State of New Jersey, Town of Irvington](#), 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); [Carter v. State](#), 243 Ala. 575, 11 So. 2d 764 (1943); [City of Cincinnati v. Black](#), 8 Ohio App. 2d 143, 37 Ohio Op. 2d 28, 220 N.E.2d 821 (1st Dist. Hamilton County 1966); [Conchito v. City of Tulsa](#), 1974 OK CR 82, 521 P.2d 1384 (Okla. Crim. App. 1974); [State v. Holcombe](#), 145 S.W.3d 246 (Tex. App. Fort Worth 2004), petition for discretionary review granted, (Apr. 27, 2005) and judgment aff'd, 187 S.W.3d 496 (Tex. Crim. App. 2006).
A city code provision banning parades within all residential zones is facially unconstitutional because parades are forms of generally directed means of communications and, as such, may not be completely banned in residential neighborhoods; however, a city may place reasonable restrictions on the right to parade in residential areas without banning parades in toto. [United Food & Commercial Workers Union Local 442 v. City of Valdosta](#), 861 F. Supp. 1570 (M.D. Ga. 1994).
Recordkeeping requirements of the Child Protection and Obscenity Enforcement Act and associated regulations advanced the government's interest in preventing child pornography, as was required for the Act and regulations to survive a free-speech challenge under an intermediate level of scrutiny; the demand for young-looking performers in an adult industry created a risk of underage participation which could be prevented or discouraged by the disclosure and reporting requirements, and such a commonsense conclusion was within the realm of congressional authority. [Free Speech Coalition v. Gonzales](#), 406 F. Supp. 2d 1196 (D. Colo. 2005).
- 18 [Sellers v. Johnson](#), 163 F.2d 877 (C.C.A. 8th Cir. 1947).
A state's police power to prevent a speaker from intentionally provoking a given group to hostile reaction is not involved where there is no showing that anyone who saw a person wearing a jacket bearing the words "Fuck the Draft" was in fact violently aroused or that the person intended such a result. [Cohen v. California](#), 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).
A segregation protest march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment. [Gregory v. City of Chicago](#), 394 U.S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969).
- 19 [Sherbert v. Verner](#), 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

16A Am. Jur. 2d Constitutional Law § 398

American Jurisprudence, Second Edition | May 2021 Update

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 398. Privileges and immunities of citizenship as imposing limitations on exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

The "privileges and immunities" provisions which are contained in some state constitutions, and in the 14th Amendment and in Article IV, § 2, of the Federal Constitution,¹ do not constrain the right of self-protection that is inherent in a state and was reserved when the Federal Constitution was adopted.² The privileges and immunities of federal citizenship do not bar a governmental authority from placing restraints upon the conduct or property of citizens if the measure is necessary for the general good.³ Furthermore, these provisions do not interfere with the power of the state to protect the lives, liberty, and property of its citizens and to promote their health, morals, education, and good order.⁴

Where a protected privilege or immunity is implicated, the state may defeat a challenge under the Privileges and Immunities Clause by showing sufficient justification for the discrimination.⁵ The state must adduce evidence that noncitizens constitute a peculiar source of the evil at which the statute is aimed and the state may defend its position by demonstrating a substantial reason for the discrimination, as well as a reasonable relationship between the degree of discrimination exacted and the danger sought to be averted by the discriminatory statute.⁶

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Footnotes

- 1 §§ 783 to 816.
- 2 *Frach v. Schoettler*, 46 Wash. 2d 281, 280 P.2d 1038 (1955) (holding that the Privileges and Immunities
- 3 Clauses of a state constitution and of the 14th Amendment to the Federal Constitution do not apply to laws
- 4 enacted by the state legislature in the proper exercise of its police power).
- 5 *Tiger v. Western Inv. Co.*, 221 U.S. 286, 31 S. Ct. 578, 55 L. Ed. 738 (1911).
- 6 *Stephens v. Stickel*, 146 Fla. 104, 200 So. 396 (1941).
- Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005).
- Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005) (holding that the state's prohibition on allowing nonresidents to
- obtain a firearms license did not violate the Privileges and Immunities Clause).

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VIII. Police Power

C. Limitations on Police Power

4. Particular Constitutional Provisions as Imposing Limitations

§ 399. Other constitutional provisions as imposing limitations on exercise of police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#)  21(2)

There is no unconstitutional Bill of Attainder¹ arising from legislative action meant to curb behavior viewed as harmful to the public welfare, as long as persons who engage in the regulated conduct can escape regulation merely by altering the course of their present activities.² A state constitutional prohibition of retrospective laws does not inhibit certain retrospective laws made in furtherance of the police power of the state.³ The prohibition against unreasonable searches and seizures has no application to reasonable rules adopted to protect public health, morals, and welfare.⁴ The General Welfare Clause⁵ of the Federal Constitution is not a limitation upon congressional power; it is instead a grant of power that has quite a wide scope, particularly in view of the enlargement of power that the Necessary and Proper Clause⁶ creates.⁷

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Footnotes

- ¹ U.S. Const. Art. I, § 9, cl. 3.
- ² [Communist Party of U.S. v. Subversive Activities Control Bd.](#), 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961).
As to bills of attainder, generally, see §§ [712](#) to [730](#).
- ³ [Jenkins v. Jenkins](#), 219 Ark. 219, 242 S.W.2d 124, 27 A.L.R.2d 861 (1951).
As to ex post facto laws and retrospective legislation, generally, see §§ [685](#) to [711](#).
- ⁴ [People v. Rivera](#), 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964).

As to the Fourth Amendment and unreasonable searches and seizures, generally, see [Am. Jur. 2d, Searches and Seizures §§ 1 et seq.](#)

5 U.S. Const. Art. I, § 8, cl. 1.

6 U.S. Const. Art. I, § 8, cl. 18.

7 *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

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